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Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 39.

WILLIAM R. BEGG and ARTHUR C.
HUME, Receivers of the Man-
hattan and Queens Traction
Corporation,

Appellants,

v.

THE CITY OF NEW YORK,
Appellee.

On Appeal From the United States Circuit Court
of Appeals for the Second Circuit.

BRIEF FOR ABOVE NAMED APPELLANTS.

Statement.

[NOTE: Throughout this Brief the *italics* are ours. References to pages are to the Transcript of the record, unless it appears that they are cross-references to pages of this brief.]

Introduction.

This is an appeal (Transcript, printed page 151) by the Receivers above named from a decree (p. 150) of the Circuit Court of Appeals for the Second Circuit *reversing* an injunction order (p. 121) made by the United States District Court for the Eastern District of New York permanently enjoining the City of New York and its authorities and employees and offices (p. 126) from considering or passing any resolution declaring forfeited or impairing the franchises of the Traction Company, (p. 125) pending the result of the main action in which the Receivers were appointed, and pending further order of the Court, *but without prejudice to further application on the part of the City to enforce its rights.*

The case in the Circuit Court of Appeals is reported under the name *Gas & Electric Securities Co. vs. Manhattan & Queens Traction Corporation, Petition of Begg*, 266 Fed. R. 625.

The plaintiff in the main action, in which the Receivers were appointed, is a judgment creditor of the Traction Company, upon a judgment of \$1,158,506.84 (Bill, p. 81), and the forfeiture of the rights or property of the Traction Company would impair the plaintiff's rights by impairing the fund or property from which the plaintiff is ultimately to be paid on account of its said judgment.

The Facts in Greater Detail.

The order of the District Court for the Eastern District of New York which was *reversed* by the Circuit Court of Appeals *granted* and continued an injunction after a hearing in equity upon petition of appellants, answer of appellee and affidavits of the parties. (Transcript, pp. 150, 151, 121-127.)

The said petition of the appellants, as receivers of the Manhattan and Queens Traction Corporation, prayed for an order, enjoining the appellee, The City of New York, during the time said receivers are in possession of the property of the said Traction Corporation, or until further order of the Court, from adopting a resolution forfeiting the franchise grant of the Traction Corporation, and from adopting a further resolution declaring the railway of the Traction Corporation the property of The City of New York without compensation and without proceedings at law or in equity, and enjoining the officers of The City of New York from interfering with the receivers' possession and operation of the railway of said Traction Corporation and its property. (Transcript, pp. 5, 19.)

One of the grounds of said petition is that said threatened action by the appellee would deprive the appellants of the property in their hands as receivers, in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellee, The City of New York, based its right to such forfeiture of the grant and the taking of such property without compensation and without action at law or in equity on an alleged breach by the Traction Corporation of a provision of its franchise requiring it to make a certain extension of its road. Under said franchise grant, as amended, it was provided that the Traction Corporation would, as directed by resolution of the Board of Estimate and Apportionment, make a certain extension to its road

“provided that title to the streets involved had been vested in the City and that said streets had been regulated and graded.”
(Transcript, p. 70.)

Appellants' petition shows that title to portions of the streets involved had *not* been vested in The City of New York, that portions of such streets had *not* been regulated and graded, and that, among other things, the appellee, The City of New York, was without power to exact or declare such forfeitures.

(A MAP showing graphically the places where the City had failed in acquiring title and in regulating and grading certain of the streets and had therefore failed to perform conditions precedent to be performed by it, is inserted at p. 69 *infra*.)

The order of the District Court granting said prayer was originally dated and entered on the 15th day of June, 1918, and resettled and re-entered on the 24th day of August, 1918. (Transcript, p. 121.) The appellants contend that this was not a final but an interlocutory order from which any appeal must be taken within thirty days (Judicial Code, §129).

The City of New York on December 5th, 1918 (long after the expiration of thirty days), appealed to the Circuit Court of Appeals for the Second Circuit from the order of the District Court. (Transcript, pp. 131-132.) The appellants contend that by reason of the expiration of the thirty days, the Circuit Court of Appeals was without jurisdiction (*infra*, p. 27).

The Circuit Court of Appeals for the Second Circuit, held the order a *final order* and by its decree dated and filed March 4th, 1920, *reversed* the order of the District Court, without prejudice, however, to the right of the receivers, the appellants, to renew their application for an injunction after the adoption of the proposed resolution, if the receivers should then have reason to believe that The City of New York is proposing to take into its possession any of the *visible and tan-*

gible property which has come into their hands as receivers, and which they are advised The City of New York is not entitled to take from their possession by virtue of the resolution aforesaid. (Transcript, pp. 150, 151.)

The appeal from said judgment and decree to this Court was duly allowed by Hon. Henry Wade Rogers, Circuit Judge, on the 14th day of April, 1920 (Transcript, p. 152), at which time he ordered that the injunction embodied in the order of the District Court entered June 15th, 1918, as resettled August 24th, 1918, be restored and held in effect during the pendency of this appeal upon the appellants filing a bond in the sum of \$2,500 conditioned as required by law, and that the same act as a supersedeas bond. (Transcript, p. 152.) This bond was duly given, approved and filed on the 15th day of April, 1920. (Transcript, p. 172.)

History of the Case.

The appellants were appointed receivers of the franchises, railway property and assets of the Manhattan and Queens Traction Corporation by order of the United States District Court for the Eastern District of New York, made on the 15th day of November, 1917, in a judgment creditors suit, in which the Gas and Electric Securities Company, a Delaware corporation, was plaintiff, and the said Traction Corporation, a New York corporation, defendant. (Transcript, pp. 80, 76.) After notice to all creditors, the appointment of said receivers was confirmed, and they were continued as receivers of the Traction Corporation by order of the said District Court, entered December 26th, 1917. (Transcript, p. 78.) Appellants, ever since, have been and now are operating the said railway of the Traction Corporation, as receivers.

The appellants, upon their appointment as receivers, found that the Board of Estimate and Apportionment of the City of New York had passed a resolution, on October 19, 1917, and had served the same upon the Traction Corporation, wherein the Traction Corporation was directed to show cause why a resolution declaring forfeited the franchise contract of October 29, 1912, and its amendments, should not be adopted, and why such resolution should not provide that the railway constructed and in use by virtue of such contract should not thereupon become the property of The City of New York without proceedings at law or in equity. (Transcript, pp. 14, 28.) Pursuant to this resolution to show cause a resolution had been prepared by the Bureau of Franchises of the Board of Estimate and Apportionment in anticipation of its action upon the hearing of said matter. This resolution provided that the Board of Estimate and Apportionment herein and hereby declares *forfeited* to The City of New York the contract, dated October 29, 1912, between The City of New York and the Traction Corporation, and the contracts modifying and amending said contract, and that the railway constructed and in use by virtue of said contracts shall, from and after the date of passage of the resolution, *become the property of The City of New York without proceedings at law or in equity.* (Transcript, pp. 14, 33, 37.) Pursuant to the said resolution to show cause, the matter was on the calendar of the Board of Estimate and Apportionment for December 21, 1917. Appellants' petition alleges and the answer of the appellee admits that the City on that date threatened to *forfeit* the franchise of the Traction Corporation and *take all of its railway constructed and in use, without any compensation whatsoever, and without proceedings of any kind at law or in equity.* (Transcript, pp. 14, 88.)

The receivers of the Manhattan and Queens Traction Corporation, appellants here, by petition in said main action, dated December 19, 1917, applied to the United States District Court for the Eastern District of New York for a *temporary restraining order*, restraining the Mayor of the City of New York and the members of the Board of Estimate and Apportionment of the City of New York from taking such threatened action, and restraining the officers and agents of the City from preventing the receivers from exercising said franchise and operating said railway and from taking any property of the corporation in their possession as receivers. In this petition to the District Court the receivers, among other things, alleged in substance that the threatened action to declare forfeited to the City the franchise of the Traction Corporation and its railway *without compensation and without any suit at law or in equity*, was inequitable and unjust, that such action would be in violation of the franchise contract and its amendments, that said action by the Board of Estimate and Apportionment would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that it would deprive the Manhattan and Queens Traction Corporation of its property without due process of law and take its private property for public use without just compensation and that the Charter of the City of New York did not give to its Board of Estimate and Apportionment the authority to provide in the franchise for a forfeiture of the railway for a breach of the franchise, or authorize the Board to declare a forfeiture of the franchise and railway for the reason and in the manner threatened, that a forfeiture could be sought only in an appropriate action *by the State*, that the City could not enforce such penalty, and that such threatened act would produce irreparable injury

to the Traction Corporation. (Transcript, pp. 14, 17, 18.)

The temporary restraining order was granted, and directed The City of New York to file in the District Court an answer to the said petition and to show cause before said Court why said restraining order and injunction should not be continued during the receivership or until further order of the Court. (Transcript, p. 5.)

The appellee filed its answer to said petition and the appellants, in turn, filed a reply thereto. The matter of continuing the injunction came on for hearing and argument in the District Court, upon which hearing affidavits were filed by both parties upon the issue as to whether or not the appellee had taken title to certain streets, and as to whether or not certain streets had been regulated and graded. (Transcript, pp. 6, 87, 96, 101, 107, 112, 114, 115, 117, 118.)

The District Court, upon said papers, *made the order granting the injunction which is the subject of consideration in this appeal.*

Facts.

The Manhattan and Queens Traction Corporation is a railroad corporation, having been duly created under the Railroad Law of the State of New York, on the 4th day of November, 1912, for the purpose of building and operating a street surface electric railway along Thomson Avenue, Hoffman Boulevard and other streets and avenues in the Borough of Queens, from the Long Island Terminal of the Queensboro Bridge to the boundary line between the City of New York and the County of Nassau, at Central Avenue. (Transcript, pp. 6, 7, 87.)

On October 29th, 1912, The City of New York entered into a franchise contract with a company called the "South Shore Traction Company,"

which franchise was duly *assigned* to the Manhattan and Queens Traction Corporation, with the consent of the Board of Estimate and Apportionment of the City of New York and the Public Service Commission of the State of New York, on the 27th day of December, 1912. (Transcript, pp. 7, 87.)

The *franchise contract*, dated October 29th, 1912, was duly amended by the Board of Estimate and Apportionment of the City of New York, on the 21st day of July, 1913, providing for certain minor changes in the route. (Transcript, p. 62.)

Said franchise contract was further amended by amendment dated January 21, 1916, which, so far as *pertinent to this appeal*, provides as follows:

“1. All of said Section 3, Seventh, of said contract of October 29th, 1912, is hereby stricken out and the following substituted therefor:

“ ‘Seventh. The Company shall complete and put in operation that portion of the railway herein authorized from the Manhattan Terminal of the Queensboro Bridge to the intersection of the tracks of the Long Island Railroad with Thomson Avenue at or near Greenpoint Avenue on or before February 13, 1913, from the intersection of the tracks of the Long Island Railroad Company with Thomson Avenue to the intersection of Thomson Avenue and Broadway on or before April 30, 1913, from the intersection of Thomson Avenue and Broadway to the proposed new Long Island Railroad station in the former Village of Jamaica, on or before January 31, 1914.

“ ‘The Company shall complete and put in operation that portion of its railway herein authorized between the present terminus thereof, at the Long Island Railroad Company's station, at Jamaica, and the intersection of Sutphin Road (Guilford Street) and

Lambertville Avenue (Pacific Street), on or before May 1, 1916, and *the remainder* of its said railway between said intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street) and the City Line at Central Avenue within such time or times as may be directed by resolution of the Board upon recommendation of the President of the Borough, *provided that title to the streets involved has been vested in the City and that said streets have been regulated and graded.*

“ ‘Upon the failure of the Company to complete the construction and place in operation *any of the said portions* of the railway on or before the dates or times herein specified, *the right herein granted* shall cease and determine, and *all sums or securities* paid to the City, or deposited with the Comptroller as security for performance by the Company of the terms and conditions of this contract, as herein provided, *shall be forfeited* to the City without action by the City provided, however, that the Board may extend the time within which to complete the construction and place the railway in operation as it may deem just and equitable.’ ” (Transcript, pp. 70, 71.)

The Traction Corporation *did*, within said times, duly complete and put in operation the *four* portions or sections of its railway between the Manhattan terminal of the Queensboro Bridge and the intersection of Sutphin Road and Lambertville Avenue, in the Borough of Queens, a distance of over ten miles (Transcript, pp. 8, 87), and continued to operate the same thereafter. (Transcript, pp. 8, 76.)

At a meeting of the Board of Estimate and Apportionment, held on February 16th, 1917, without the matter appearing on the calendar of the said Board, or without the Manhattan and Queens Traction Corporation having any notice of said

proposed action whatsoever, or having an opportunity to be heard, the President of the Borough of Queens offered, and there was adopted, a resolution which, without the preamble, is as follows:

“Resolved, That, pursuant to said Section 3, Seventh, of said contract of October 29th, 1912, as amended by said contract of January 21st, 1916, the Manhattan and Queens Traction Corporation be, and it hereby is, directed to commence construction of *that portion* of its street surface railway authorized by said contract of October 29th, 1912, as amended by said contract of July 21st, 1913, from the intersection of Sutphin Road and Lambertville Avenue to the intersection of Central Avenue and Springfield Road, within thirty (30) days, and to complete and put in operation said portion of its street surface railway within six (6) months from the date of the approval of this resolution by the Mayor.”

The above resolution was approved by the Mayor of the City of New York on February 23rd, 1917. In accordance with its terms, it required the Traction Corporation to commence the construction of a *part* of the *last section* of its railway by March 23rd, 1917, and to complete and put same in operation, on or before the 23rd day of August, 1917. (Pet. Par. XII, p. 10; Ans., Par. Fourth, p. 87; Exhibit A-1, pp. 21-22.)

The Traction Corporation did not comply with said resolution, for the reason, among others, that the appellee, *The City of New York*, had not vested in itself title to all the streets involved, nor had it regulated and graded a considerable portion thereof, which vesting of title and grading and regulation of such streets was, by the said amendment of January 21st, 1916, made a condition precedent to the obligation of the Traction Corporation to construct said extension, as will be

more particularly shown hereafter under Point II. Furthermore, even if the City had performed said condition precedent, war conditions necessitating governmental regulations and priority orders, made impossible the securing of materials for such extension, and the demand by the appellee for such extension under such conditions was unjust and inequitable, as will be shown hereafter. (A map showing graphically the places in which and the extent to which the City had failed in the performance of these conditions will be found at p. 69 of this brief.)

Assignment of Errors.

The assignment of errors relied upon in this appeal are as follows (Transcript, p. 153, *et seq.*):

I.

That the Circuit Court of Appeals for the Second Circuit erred in reversing the injunction order of the United States District Court for the Eastern District of New York, entered herein on the 15th day of June, 1918, and re-entered on the 24th day of August, 1918.

II.

That the Circuit Court of Appeals for the Second Circuit erred in dissolving the injunction embodied in the order of the United States District Court for the Eastern District of New York, entered June 15, 1918, and re-settled and re-entered August 24th, 1918.

VII.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that the

passage of the proposed resolution by the Board of Estimate and Apportionment of the City of New York, declaring forfeited the franchise contract of the Manhattan and Queens Traction Corporation dated October 29th, 1912, and its amendments would be a violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, in that by the passage of said resolution the Manhattan and Queens Traction Corporation and its receivers would be denied the equal protection of the laws.

VIII.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that the passage of the proposed resolution by the Board of Estimate and Apportionment of the City of New York, declaring that the railway constructed and in use by virtue of said franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments, shall become the property of the City of New York, without proceedings at law or in equity, would be in violation of Section I of Article 14 of the Amendments to the Constitution of the United States, in that by the passage of said resolution the Manhattan and Queens Traction Corporation and its receivers would be denied the equal protection of the laws.

IX.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that the passage of the proposed resolution by the Board of Estimate and Apportionment of the City of New York, declaring forfeited the franchise contract dated October 29th, 1912, and its amend-

ments, would be a violation of Section I of Article 14 of the Amendments to the Constitution of the United States, in that the Manhattan and Queens Traction Corporation and its receivers would be deprived of its and their property without due process of law.

X.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that the passage of the proposed resolution by the Board of Estimate and Apportionment of the city of New York, declaring that the railway constructed and in use by virtue of said franchise contract dated October 29th, 1912, and its amendments shall become the property of the City of New York, without proceedings at law or in equity, would be a violation of Section I of Article 14 of the Amendments to the Constitution of the United States, in that by its passage the Manhattan and Queens Traction Corporation, and its receivers, would be deprived of its and their property without due process of law.

XVI.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that by the passage of the proposed resolution by the Board of Estimate and Apportionment of the City of New York, declaring forfeited the franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments, would be a violation of and unauthorized by Section 73 of the Charter of the City of New York, Chapter 378 of the Laws of 1897 as amended by Chapter 466 of the Laws of 1901 and 629 of the Laws of 1905, in that the said Charter

does not grant to the City the authority to provide for the forfeiture of a grant for the failure to extend a street railway.

XVII.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that by the passage of said proposed resolution by the Board of Estimate and Apportionment of the City of New York declaring that the railway constructed and in use by virtue of said franchise contract dated October 29th, 1912, and its amendments, shall become the property of the City of New York, without proceedings at law or in equity, would be a violation of Section 73 of the Charter of the City of New York, in that said Charter does not grant the power, right or authority to the City of New York to forfeit the railway of the Manhattan and Queens Traction Corporation, constructed and in use by virtue of said franchise contract and its amendments for failure to extend said railway or for any other reason whatsoever.

XVIII.

That the Circuit Court of Appeals for the Second Circuit erred in finding and determining that the City of New York had the power, by virtue of Section 73 of the Charter of the City of New York, to make provision by way of forfeiture of the franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments for the failure of the Traction Corporation to extend its railway from the intersection of Sutphin Road and Lambertville Avenue to the intersection of Central Avenue and Springfield Road.

XIX.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and decreeing that the provisions for forfeiture in the franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments, were *ultra vires* of the City of New York.

XXI.

That the Circuit Court of Appeals for the Second Circuit erred in not finding and determining that the City of New York had no power or right under Section 73 of the Charter of the City of New York to make any provision by way of forfeiture of the franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments, other than to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the said grant.

XXII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the court below did not have power to restrain the Board of Estimate and Apportionment of the City of New York from proceeding to declare, as threatened, the forfeiture of the franchise of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and its amendments.

XXIII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the

City of New York had power to grant a conditional consent to the Manhattan and Queens Traction Corporation which might be withdrawn by the City of New York at any time.

XXVII.

The Circuit Court of Appeals for the Second Circuit erred in finding and determining that the Court below did not have jurisdiction to enjoin the Board of Estimate and Apportionment of the City of New York from passing the proposed resolution of forfeiture quoted in the opinion of the Circuit Court of Appeals for the Second Circuit.

XXXI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the lower court did not have power by injunction to restrain the City of New York and its Board of Estimate and Apportionment from taking the contemplated action and passing the proposed resolution forfeiting the franchise contract of the Manhattan and Queens Traction Corporation, even though the contemplated action might have been in disregard of constitutional restraints and might have impaired the obligation of the said franchise contract.

XXXII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the forfeiture of the franchise contract of the Manhattan and Queens Traction Corporation and its amendments was a judicial question to be adjudicated in a direct proceeding brought by the State of New York through its attorney general.

XXXIII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that a formal judicial proceeding was unnecessary in this case before the City of New York and its Board of Estimate and Apportionment could forfeit the franchise contract of the Manhattan and Queens Traction Corporation and its amendments.

XXXIV.

The Circuit Court of Appeals for the Second Circuit erred in holding that the Manhattan and Queens Traction Corporation did not comply with its franchise contract, dated October 29th, 1912, and its amendments.

XXXVI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the franchise contract, dated October 29th, 1912, and its amendments, automatically ceased and determined on the 23rd day of August, 1917.

XXXVIII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the Manhattan and Queens Traction Corporation and the receivers had no legal excuse for the failure of the Manhattan and Queens Traction Corporation to construct and put in operation its railway beyond the intersection of Sutphin Road and Lambertville Avenue on or before August 23rd, 1917.

XXXIX.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the terms and conditions of the franchise contract dated October 29th, 1912, and its amendments, and of the forfeiture thereof are to be determined by the City of New York through its Board of Estimate and Apportionment, both as respects the grant and the forfeiture thereof.

XL.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the Manhattan and Queens Traction Corporation and its receivers are estopped to contest the validity of the conditions and covenants of the franchise contract of October 29th, 1912, and its amendments, either as *ultra vires* the municipality or as beyond its own powers.

XLI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the Manhattan and Queens Traction Corporation is estopped from questioning the validity of the terms and conditions of the franchise contract of October 29th, 1912, and its amendments, and of the terms and conditions of the forfeiture provisions thereof.

XLII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that it could make no difference that the franchise con-

tract of October 29th, 1912, and its amendments were forfeited automatically by failure to complete the line from the intersection of Sutphin Road and Lambertville Avenue within the period prescribed and that the forfeiture "of the railway" to the City of New York, was to become effective from the date of the passage of the enjoined resolution.

XLIV.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that title to the streets involved between the intersection of Sutphin Road and Lambertville Avenue and the intersection of Central Avenue and Springfield Road was vested in the City of New York on the 16th day of February, 1917.

XLV.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that the resolution adopted by the Board of Estimate and Apportionment on February 16th, 1917, directing the Manhattan and Queens Traction Corporation to commence the construction of that portion of its street railway authorized by its franchise contract and amendments from the intersection of Sutphin Road and Lambertville Avenue to the intersection of Central Avenue and Springfield Road within thirty (30) days, and to complete and put in operation the said portion of its street railway within six months from February 23rd, 1917, was void as being in violation of Section 3, Paragraph Seventh of the franchise contract of October 29th, 1912, as amended January 21st, 1916, for the reason that title to all portions of the streets involved was not vested in the City of New York and said

streets were not regulated and graded to their legal grade and full width on February 16th, 1917, as required by said franchise contract and its said amendments.

XLVI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that because title to the right of way of the Long Island Railroad, upon which are its tracks and which crosses Lambertville Avenue just west of Carlisle Street, was not vested in the City of New York on the 16th day of February, 1917, presented no obstacle in the construction of the railway of the Manhattan and Queens Traction Corporation on Lambertville Avenue.

XLVIII.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that the Manhattan and Queens Traction Corporation was not required by the terms of the franchise contract of October 29th, 1912, and its amendments to construct a trestle over the tracks of the Long Island Railroad Company where the said tracks cross Lambertville Avenue.

LXIX.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the City of New York through its Board of Estimate and Apportionment could, on February 16th, 1917, compel the Traction Corporation to construct its railway on Lambertville Avenue over the tracks of the Long Island Railroad where they cross said Avenue at Carlisle Street or forfeit the franchise contract.

L.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that the Traction Corporation had not acquired the legal right, on February 16th, 1917, to cross the right of way of the Long Island Railroad on Lambertville Avenue at grade or otherwise.

LI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that Lambertville Avenue, on February 16th, 1917, was "regulated and graded" as required by the franchise contract dated October 29th, 1912, and its amendment of January 21, 1916, by Section 3, Paragraph Seventh of said amendment.

LII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that by Section 3, Paragraph Eighth of the franchise contract of October 29th, 1912, and its amendment of January 21st, 1916, the Manhattan and Queens Traction Corporation was required to construct a trestle over the tracks of the Long Island Railroad Company where they cross Lambertville Avenue at Carlisle Street, and over the tracks of the Long Island Railroad Company where they cross Central Avenue, just west of Montauk Avenue and just east of Caxton Avenue.

LIV.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that the

meaning of "regulated and graded" as used in the franchise contract of October 29th, 1912, and its amendment of January 21st, 1916, Section 3, Paragraph Seventh of said amendment, meant regulated and graded to a legal grade and full width as established by the City of New York.

LV.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the streets involved between the intersection of Sutphin Road and Lambertville Avenue and the intersection of Central Avenue and Springfield Road were regulated and graded as required by the franchise contract of October 29th, 1912, and its amendment of January 21st, 1916, Section 3, Paragraph Seventh thereof.

LVI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that it was not the duty of the City of New York, under the terms of the franchise contract of October 29th, 1912, and its amendments, to remove poles, curbs, water hydrants, trees and other obstructions before the City could compel the Manhattan and Queens Traction Corporation to construct and put in operation its railroad beyond Sutphin Road and Lambertville Avenue.

LX.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that title to Central Avenue, composed of Ulster Avenue, Westchester Avenue, 117th Avenue and Dearborn Avenue, between the intersection of Springfield

Road and the City Line, at the County of Nassau, was vested in the City of New York, on the 16th day of February, 1917.

LXII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that on February 16th, 1917, title had been vested in Central Avenue between Smith Street and Springfield Road as required by the franchise contract of October 29th, 1912, and its amendment of January 21, 1916.

LXIII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that Central Avenue, composed of Ulster Avenue, Westchester Avenue, 117th Avenue and Dearborn Avenue, was regulated and graded on February 16th, 1917, as required by the franchise contract of October 29th, 1912, and its amendment of January 21st, 1916.

LXIV.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the failure by the Traction Corporation to construct and put in operation its railway in accordance with the resolution of the Board of Estimate and Apportionment adopted February 16th, 1917, between the intersection of Sutphin Road and Lambertville Avenue and the intersection of Central Avenue and Springfield Road gave the City of New York the right to forfeit the entire franchise contract and its amendments.

LXV.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that at most the failure of the Manhattan and Queens Traction Corporation to construct and put in operation its railway as required by the resolution of February 16th, 1917, only permitted the forfeiture of the part uncompleted and not the part constructed and in use or the whole grant.

LXVI.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that, even if the Traction Corporation had failed to make the extension provided for in the resolution of the Board of Estimate and Apportionment dated February 16th, 1917, the City could only forfeit the franchise right to the portion which the Company failed to construct and put in operation or forfeit the sum of fifteen thousand dollars (\$15,000) as a penalty in case the Company failed to construct the remainder of its route.

LXXI.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the court below did not have the power to protect the property in its possession from being taken by the threatened action of the City of New York by the passage of the proposed forfeiture resolution.

LXXIV.

The Circuit Court of Appeals for the Second Circuit erred in not holding and determining that

the court below had jurisdiction to enjoin threatened action of the City of New York on the ground that the injury to the property in the possession of its receivers would be irreparable.

LXXVIII.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the franchise contract of October 29th, 1912, and its amendments made time of the essence of the said franchise contract relative to extension beyond the intersection of Sutphin Road and Lambertville Avenue.

LXXIX.

The Circuit Court of Appeals for the Second Circuit erred in holding and determining that the Court below as a court of equity could not relieve the Manhattan and Queens Traction Corporation from failure to extend its railway beyond the intersection of Sutphin Road and Lambertville Avenue as required by the resolution of February 16th, 1917.

Points Now Made.

In support of its contention that the Circuit Court of Appeals erred in its decree of reversal, the appellants now urge:

I. That the Circuit Court of Appeals was wholly without jurisdiction because the so-called permanent injunction was an interlocutory and not a final injunction, and the injunction order was an interlocutory and not a final order, and the appeal therefrom was not taken within the time allowed

by law for taking an appeal from an interlocutory order for injunction (*infra*, pp. 27-44).

II. That the Circuit Court of Appeals erred in its determination on the merits (*infra*, pp. 44-180).

III. That the decree of the Circuit Court of Appeals should be reversed and the order of the District Court reinstated (*infra*, p. 180).

BRIEF AND ARGUMENT.

I.

The Circuit Court of Appeals was wholly without jurisdiction because the so-called permanent injunction was an interlocutory and not a final injunction, and the injunction order was an interlocutory and not a final order, and the appeal therefrom was not taken within the time allowed by law for taking an appeal from an interlocutory order for injunction.

The main suit (a judgment creditors' action) was marked for decree, but no final decree had been entered (Recital, order for injunction as resettled August 24, 1918, pp. 121, 122), though the Receivers had been (Dec. 26, 1917) made permanent (*ibid.*, p. 122; order, p. 78), and were continued in possession of the franchises, rights, railway property and assets until the trial of the main action and decree, or further order of the Court (p. 79).

A few days (Dec. 19, 1917) prior to being so continued, the Receivers had filed their petition (p. 6) upon which the injunction now in controversy was ordered. The order to show cause (p.

3) upon the petition was made December 19, 1917, was returnable December 26, 1917 (p. 5), the day when the Receivers were so made permanent; the injunction order was made June 15, 1918 (p. 122) and was resettled August 24, 1918 (p. 121).

The appeal to the Circuit Court of Appeals was taken and allowed (pp. 131; 132) December 5, 1918, *more than three months* after the resettlement of the order, though the time fixed by law for an appeal from an interlocutory order granting an injunction is *30 days* from its entry (Judicial Code s. 129).

This fact was brought to the attention of District Judge Chatfield, who allowed the appeal, and who noted (pp. 131, 132) that though the order is in form within section 129 of the Judicial Code requiring appeal within 30 days, still upon the authority of *Odell vs. Batterman*, 223 Fed. R. 295, he allowed it as an appeal from a *final* order; though he also noted that the question of time was not brought in question on the case cited because the appeal was taken in 5 days; yet the decree and order in that case was considered as if within the six month statute (footnote, Transcript, p. 132).

Thus it appears that upon the authority of a case where the question of time was not raised, the appeal was allowed, though the 30 days had previously expired.

Upon this slender thread of authority hangs the question of jurisdiction, and we maintain that it is inadequate authority and inapplicable.

The appellants moved in the Circuit Court of Appeals to dismiss the appeal (Transcript, p. 140), contending that the order entered August 24, 1918, was an interlocutory one granting and continuing an injunction, and as the appeal had not been taken within thirty days, as required by Section 129 of the Judicial Code, the Circuit Court

of Appeals had no jurisdiction to hear the appeal therefrom. The Circuit Court of Appeals held that the order was a final one within the rule laid down by itself in *Odell v. Batterman* (*supra*), and entertained the appeal (Transcript, pp. 140, 141, 142).

It here affirmatively appears that the jurisdiction of the Circuit Court of Appeals depended upon the determination of the question whether the injunction order of the District Court, entered June 15, 1918, and re-entered August 24, 1918, was an interlocutory order continuing an injunction until further order of the District Court, or whether it was a final order (Transcript, pp. 131, 132). The fact that the order was first entered June 15, 1918, and re-settled and re-entered August 24, 1918, appears from the order itself and from the petition and notice of appeal of the appellee. The appeal from this order was not taken by the appellee until December 5, 1918 (Transcript, pp. 121, 131-2).

The District Judge in this case allowed the appeal to the Circuit Court of Appeals solely on the authority of *Odell v. Batterman*, 223 Fed., 292 (*supra*, p. 28), although he said the order was in form within Section 129 of the Judicial Code, requiring an appeal within thirty days. The District Judge's order allowing the appeal and his comment on the case of *Odell v. Batterman* appear in the record at pages 131 and 132, and are as follows:

"And now, to wit: on December 5th, 1918, it is ordered that the appeal be allowed as prayed for as an appeal from a final order as covered by the assignments of error upon the authority of *Odell v. Batterman*, 223 Fed., 295,* although the order is in form within

* In *Odell v. Batterman* the appeal was taken in 5 days but that does not seem to have been brought in question on the appeal and the decree or order was considered as if within the 6 months statute.

Section 129 of the Judicial Code requiring appeal within 30 days."

An examination of the record will show that the injunction order of August 24, 1918, was merely interlocutory and was granted upon the petition of the receivers, the answer of the City and the reply of the receivers and upon certain affidavits, as is the usual course in making out a *prima facie* case in obtaining an injunction *pendente lite* as the result of an order to show cause. The record discloses that the issues raised by the petition have not been finally disposed of, and, further, an examination of the order itself shows, upon its face, that it is not a final order, either in form or in fact.

It is evident the appellants, the receivers, in their petition, did not seek final relief. What was sought was an order to protect them in the possession of the franchise and property of the Traction Corporation against the threatened interference with such possession by the officials of the City of New York, during the pendency of the receivership or until further order of the Court, that is, until the claim of The City of New York to the grant or property of the Traction Corporation could be properly determined in the main action along with the rights of all other claimants to the final disposition of the property, as The City of New York was then asserting the right to the franchise and property without action at law or in equity.

The sole relief prayed for in the petition of the appellants is as follows:

"Wherefore, your petitioners respectfully pray for an order in the form annexed, and for such other and further direction and relief in the premises as the Court may deem just, proper and equitable." (Transcript, p. 19.)

The relief asked for in the order annexed to the petition was three-fold: (a) A temporary restraining order restraining the officials of the City of New York from interfering with the franchises and property in the possession of the receivers until further order of the Court; (2) a reasonable time to determine whether the receivers shall accept the terms of the franchise; (3) and a direction that appellee file its answer to the petition and show cause "why this restraining order and injunction should not be continued during the time the receivers of this Court are in possession and control of the franchises, rights and properties and assets of the Manhattan and Queens Traction Corporation and until further order of this Court." (Transcript, p. 5.)

It is evident that the hearing upon the order to show cause asked by the appellants contemplated only an order continuing the injunction during the receivership, or until the further order of the Court. To say that upon a hearing had pursuant to such an order to show cause, upon meager pleadings (if they can be called such) and incomplete affidavits, a final adjudication was sought as to the rights and properties involved, and, too, without any consideration of the rights of lienors and creditors and without an opportunity given to establish their respective rights, is scarcely tenable.

That the District Court did not itself conceive that it was making, without a trial, a final determination of these important issues of fact, is plainly evident from the form of the order made:

"Ordered and decreed that the motion of the receivers for a permanent injunction brought on by said order to show cause, dated and entered herein December 19, 1917, be, and the same hereby is, granted; without prejudice to any further or other application to this

Court for the enforcement of any claim or right of The City of New York as to said matters; and it is further ordered and decreed that the temporary injunction granted December 19, 1917, be made permanent pending further order in the action." (Transcript, p. 125.)

Said order further enjoined all officials of the City of New York from declaring a forfeiture or interfering with possession of the receivers "unless after application to this Court" or "until further order of this Court" or "unless after further order of this Court." (Transcript, pp. 126-127.)

It is true that the quoted part of the order states that the temporary injunction is made permanent pending further order in the action. The word "permanent," so used, when construed with the qualifying words and numerous other reservations and qualifications in the order showing that final determination was being reserved, and when considered in the light of the prayer for relief and the object sought, can have no other meaning in fact than an injunction *pendente lite*.

There was nothing in the order which prevented the appellee from making application to the Court for leave to institute a suit to determine its rights or for leave to file a petition of intervention and to intervene in the main action to determine whatever rights it had, if any, to the franchises and property of the Traction Corporation. In such an intervention the rights of creditors, lienors and all other parties in the franchises and property of the Traction Corporation could then be determined after a formal trial of the issues tendered.

The consequences of the Circuit Court of Appeals holding the order is final, may mean that

rights of creditors and lienors are cut off without a hearing, and this, too, in a proceeding where the Circuit Court of Appeals has decided that the District Court has not the power to entertain the petition, while it itself determines, in advance of trial, vital issues of fact.

All that the hearing on the order to show cause decided was that the receivers were entitled to an injunction pending the receivership, or until further order of the Court. This in no sense disposed of the entire controversy upon the merits.

In High on Injunctions, Fourth Edition, Sec. 1591, is the following:

“The practice of allowing a perpetual injunction upon motion founded upon affidavits is without precedent, and will not be entertained.”

This Court has held in a number of cases that whether or not an order is final is to be determined by its form.

Hazeltine v. Central National Bank, 183

U. S., 130, at 132;

Louisiana Nav. Co. v. Oyster Comm., 226

U. S., 99, at 101;

City of Paducah v. East Tenn. Telephone Co., 229 U. S., 476.

A decree that does not dispose of all the issues and the entire controversy upon the merits is not final.

Clark v. Kansas City, 172 U. S. 334;

Deslions v. LaCompagnie Generale Tran.,
210 U. S., 95, at 112;

Rexford v. Brunswick-Balke-Collender Co., 228 U. S., 339.

The order appealed from on its face is not final, since it is "without prejudice to any further or other application" of the appellee and is to continue "until further order in the action." At most, the injunction is to continue until disposition of the main action or until further order of the Court; nor does it dispose of the entire controversy, since the rights of creditors or lienors to the property in the possession of the Court, as against the right of the appellee thereto, are not determined.

*Discussion of the Odell case cited as authority for
the Appeal within six months to the
Circuit Court of Appeals.*

Odell vs. H. Batterman Co., 223 Fed. R. 292, was an appeal, taken, as shown by Judge Chatfield (*supra*), within five days after entry, from an order denying a landlord permission to sue in ejectment to recover leased premises in the possession of Receivers appointed by the Court in an action concerning an insolvent corporation, the tenant.

The application for leave to sue was denied unless the landlord accepted certain terms imposed by the Court; and it was provided that the landlord might test his rights of entry, upon affidavits, in the Court which appointed the Receivers (p. 294).

As the Court had previously enjoined all suits against the corporation or its receivers (p. 294), it is obvious that the application for leave to sue, was an application to modify the injunction, and that the refusal of leave except on terms was an order continuing the injunction; and as it was made in the progress of the action and was not a determination of the controversy as between the

original parties, the order might well have been considered an interlocutory order within section 129 of the Judicial Code, from which the very appeal might have been taken and jurisdiction of the appeal maintained.

The Court, however (p. 295), considered that the order denying permission to sue in ejectment in another court, save on condition that the tenant only should be sued, and that the landlord stipulate that the Receivers might intervene and stay the ejectment action during their possession, was a final order.

It concluded that the test of finality for the purposes of appeal is whether the decree disposes of the entire controversy between the parties, or involves a *determination* of a substantial right against a party in such a manner as leaves him no adequate relief except by appeal (p. 295).

Applying the test to the case before it, the Court considered that the landlord, out of possession, claimed the right to *immediate* possession and the right to have this determined with reasonable speed (p. 295). It considered that the denial of the landlord's application conclusively determined the landlord's proceeding and left him without relief until the Receivership was terminated.

Illustrative cases are cited (p. 296) to sustain the view that postponement until after a receivership, or denial of leave to intervene are final and appealable orders.

The question whether it was or would have been appealable even if an interlocutory order was not discussed in the opinion, nor in the briefs of counsel (Association of the Bar of the City of New York—Cases on Appeal, U. S. Circuit Court of Appeals, 2d Circuit, Vol. 1215).

The appellant's counsel (*ibid*: Brief, p. 12) discussed the specific order appealed from and showed that its conditional clauses each and all were framed to defeat the right of immediate possession, which the landlord had asked permission to test. And they distinguished *Rexford vs. Brunswick-Balke Co.*, 228 U. S. 339, as an illustration of an order interlocutory both in form and substance.

Counsel for the appellee (*ibid*: Brief, p. 17) relied upon *Bostwick vs. Brinckerhoff*, 106 U. S. 3, as establishing that the decree appealed from was not final. Neither side, in the briefs, nor the Court, referred to the fact that if regarded as interlocutory, and as continuing an injunction, the appeal was nevertheless taken in time, and the Court would still have had jurisdiction of the appeal. (Appeal allowed, Oct. 31, 1914; order appealed from, made and entered Oct. 26, 1914; interval 5 days—*ibid*, Transcript of Record in said cause, pp. 84, 81.)

The present case distinguished; the order appealed from was interlocutory only.

But the present decree does not sufficiently resemble the order in the Odell case to make the latter controlling; in this case, the City of New York was not asking relief from the Court; it denied its jurisdiction (Transcript, pp. 1, 2); the Receivers were the moving parties, to protect the franchises and property in the hands of the Receivers from threatened action, and from interfering with the franchises or property or the Receivers' possession and control. The original *order to show cause* made upon the Receivers' petition did not pray for a permanent injunction, but (Transcript, p. 5) was an order to show cause:

“why this restraining order and injunction should not be continued during the time the Receivers of this Court are in possession and control of the franchises, rights, property and assets of the Manhattan and Queens Traction Company and *until* further order of this Court.”

The said petition (p. 19) prayed for such order to show cause

“and for such other and further direction and relief in the premises as the Court may deem just, proper and equitable.”

The injunction order did not finally determine any controversy with the City of New York. In the formal objection to jurisdiction (pp. 1, 2) the City among other objections urged that the threatened resolution would be ineffectual to impair the rights or franchises of the Traction Corporation, if it should be made to appear that title to the streets and avenues involved were not in the City and were not regulated and graded.

In its answer (pp. 87-94), in dealing with these questions, it takes issue with Paragraph XV of the petition (p. 12); it does not categorically deny Paragraphs XIII and XIV, but its answer to these paragraphs is in a measure a confession, if not an avoidance (see Paragraphs of Answer Eighth, Ninth, Tenth, Eleventh, pp. 88, 89). It raised many other issues by denials (pp. 87-88). The injunction order did not finally adjudicate the controversy but left the disputed matters or some of them open for further determination, when the City should become a moving party, as it was specifically permitted to do.

Instead of adjudicating the rights of the City of New York, it granted the injunction (p. 125)

“without prejudice to any further or other application to this Court for the enforcement of any claim or right of the City of New York as to said matters”;

it restrained the City authorities (pp. 125, 126) from doing any of the things enjoined:

“unless after application to this Court”

Six times is this saving clause inserted (pp. 125, 126) and once (p. 126)

“until further order of this Court.”

It seems that it ought to be indisputable that an injunction issued at the instance of Receivers in possession, against interfering with their property or possession, *“until further order of this Court,”* or *“unless after application to this Court,”* could in no sense whatsoever properly be regarded as within any test of a final order ever proposed by anybody whomsoever, or any Court whatsoever.

In interpreting his own view, Chatfield, D. J., in his opinion (p. 133) said:

“This Court has power to prevent interference with the property in possession of its officers and the matter is not one where protection of the Receivers will deprive the City of its rights to sue or to proceed against the receivers who have only the title and property in their possession which was vested in the corporation prior to their appointment. Odell vs. Batterman, 223 Fed. R. 292.”

It is thus obvious that the Judge who made the order did not consider that it was intended to deprive the City of the fullest right to sue or to proceed, provided only it should apply to the Court, either for leave, or for a determination of

its right. The order forbade nothing but arbitrary action without leave of Court.

If this be a final order, then section 129 of the Judicial Code is pure surplusage, and every order entered enjoining action without leave or until further order is a final order, appealable under sec. 128 regardless of section 129, and section 129 is only a small gate for those who could emerge through its larger neighbor at all events.

The *opinion* of the Circuit Court of Appeals says:

(p. 141)

"An interlocutory injunction is one granted prior to the final hearing and determination of the matter in issue, and which is to continue until answer, or until the final hearing, or until the further order of the Court. Its object is to maintain the *status quo*, to maintain the property in its existing condition and prevent further or *impending* injury, and not to determine the rights of the parties."

We submit that this definition describes the order appealed from, though the Circuit Court of Appeals thought otherwise. The injunction is none the less interlocutory because the rights of the parties are considered in reaching a conclusion whether it should be granted. The question of its character is determined not by the processes of reasoning through which the conclusion is reached, but by the condition in which the rights of the parties is left, when it has been reached.

In this case, by express provision in the order, the City might still apply to the Court for leave to do any one of the forbidden things, and the order was (p. 125)

"without prejudice to *any* further or *other* application to this Court for the *enforcement* of *any* claim or *right* of the City of New York as to said matters."

It is difficult to conceive any phraseology or form of expression which would have made it more obvious and certain that the Court was making no final decision respecting the rights in controversy. Unlike the order in the *Odell* case (*supra*, p. 28) this order did not even suspend the enforcement of rights pending the action; it merely suspended them, until the City should at any time apply to the Court for the enforcement of any claim as to said matters; and in that event the order was to be "without prejudice."

We submit that no order which is without prejudice, and which permits further application unrestricted in its nature can be properly regarded as final in any sense.

And we respectfully take issue with the argument or opinion of the Circuit Court of Appeals, which said (p. 142):

"The fact that the order was without prejudice to any further application to the Court for the enforcement of any of the rights of the City certainly cannot have the effect of converting what is otherwise a final order into an interlocutory one."

The order was not a final order; whether it was final is to be determined from its entire contents; and it was not, judged by its entirety, a final order. An interlocutory order does not become final because the judge has made up his mind on the law of the case and says so. It becomes final when by its terms or necessary effect there is no relief from the situation which it creates except by appeal, and even then it is not final unless it adjudges the controversy between the parties, without the reservation of the right to proceed further with it and secure a hearing which will determine the principles to be ultimately applied between them (see

infra, pp. 41-43). It is not the fixedness of the judge's mind, but the crystallization of the rights of the parties which fixes its finality and this was not accomplished by the order of the District Court. In substance the order merely said:

"Don't take these steps until you apply to this Court to declare your legal rights in this matter; and you may do that without prejudice, whenever you so desire; and then we will make an order which will determine those rights."

The fact that the judge had fixed ideas as the Circuit Court of Appeals suggests, as to the existence of the rights (p. 142), did not nullify the words "without prejudice", which were just as much a part of the order as was the injunctive part.

The distinction between final decrees, appealable as such, and interlocutory decrees appealable under sec. 129 of the Judicial Code is illustrated by the cases in which the *Odell* case has been cited:

Stokes vs. Williams, 226 Fed. R. 148, 152, (3d Circuit, 1915)—which describes final decrees (p. 152) as having "that finality which *completely* ends and *entirely* disposes of the matter to which it relates, and which leaves the aggrieved party *no* adequate remedy except recourse to an appeal.

In *Ward Baking Co. vs. Weber Bros.*, 230 Fed. R., at p. 155 (3d Circuit, 1916) are cited illustrative patent cases, where (there being then no appeal from certain interlocutory orders denying an injunction) it was held that when a bill was dismissed against one of two joint defendants, or as to one of two causes of action there could still be no appeal until after the disposal of the bill by ultimate decree. And this, of course, though the dismissal settled that part of the controversy with no recourse but an ultimate appeal.

In *Dickinson vs. Willis*, 239 Fed. R. 171 (Dist. Ct. Iowa, 1916) the question under consideration was the exclusive jurisdiction of Courts over property in possession of their receivers. Yet, incidentally (p. 177) there is an excellent illustration of the nature of a final decree in its characterization of a state court decree against the receiver appointed by a federal court:

“There will be nothing for the appointing court to act upon. It will have no power to review the validity of the injunction. It becomes effective at once, regardless of what hardship it may impose upon the receiver, and without reference to its effect upon the management of the business for which the receiver was appointed.”

In our case, whatever may have been the opinion of the District Court, its injunction order lacked these aspects of finality; by the terms of the order the City was to have free access to the Court to enforce any of its claims or rights without prejudice from the order. It merely provided that the City and its agents were not to interfere with the property or possession of the Receiver until the City had made application and obtained leave, or had its rights adjudicated.

A further excellent illustration is afforded by *Weideman vs. Newton Arms Co.*, 260 Fed. R. 348 (Dist. Ct. W. D. N. Y., 1919), where it was held that rights under an injunction order procured by a receiver to protect assets in his hands, did not devolve upon the purchaser at the Receiver's sale, so that he could avail himself of the benefit of the injunction; and this because it was not a final decree, but merely a protective order incidental to the receivership.

In *Rexford vs. Brunswick Balke Co.*, 228 U. S. 339, at p. 345, the retention of the case for further

orders was recognized as one of the *indicia* of a decree interlocutory and not final. And in that case the Circuit Court of Appeals had erroneously entertained jurisdiction on the assumption that the order was a final one and therefore appealable.

We cite below (p. 43) cases in this Court which have reversed the Circuit Court of Appeals when it appeared to this Court from an inspection of the record that the Court of Appeals had no jurisdiction; and which establish that whether an order is final or not depends upon its form, and whether it disposes of all the issues and of the entire controversy upon its merits. This order was not in form substance final. It did not either in purport or effect finally dispose of any of the rights in controversy but left them all open for future determination by the Court.

If it affirmatively appears from the record that the Circuit Court of Appeals did not have jurisdiction to hear the appeal, this Court, in the exercise of its appellate power, without an assignment of error, can reverse the judgment of that Court.

Mansfield C. & L. M. R. Co. v. Swan, 111 U. S., 379;

Chicago, B. & Q. R. Co. v. Willard, 220 U. S., 413;

Baltimore & O. R. Co. v. U. S. ex rel. Pitcairn Coal Co., 215 U. S., 481;

Parker v. Ormsby, 141 U. S., 81.

In *Parker v. Ormsby* (*supra*), the Court said:

"If jurisdiction did not affirmatively appear, upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in

all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

WE THEREFORE SUBMIT THAT THE ORDER OF THE DISTRICT COURT WAS NOT IN ANY SENSE A FINAL ORDER, THAT THE CIRCUIT COURT OF APPEALS WAS WITHOUT JURISDICTION; ITS ORDER SHOULD BE REVERSED FOR WANT OF JURISDICTION AND THE INJUNCTION ORDER BE AGAIN REINSTATED.

Rexford vs. Brunswick Balke Co., 228 U. S. 339.

If the foregoing point be sustained, further argument is unnecessary.

II.

The Circuit Court of Appeals erred in its determination on the merits.

Assuming, merely for the sake of pursuing this phase of the argument, that the Circuit Court of Appeals had jurisdiction, we maintain that it erred in its disposition of the appeal.

The decree of the Circuit Court of Appeals was a final and not an interlocutory decree; and an appeal lies to this Court.

The decree of the CIRCUIT COURT OF APPEALS (pp. 150, 151) reversed the injunction order,

"without prejudice, however, to the right of the Receivers to renew their application *after* the adoption of the proposed resolution by the Board of Estimate and Apportionment,

if the Receivers then have reason to believe that the City of New York is proposing to take into its *possession* any of the *visible* and *tangible* property which has come into their hands as Receivers and which they are advised the City of New York is not entitled to take from their possession by virtue of the resolution aforesaid."

The Circuit Court of Appeals, thus *finally* determined that there should be no judicial interference with the forfeiture by the City of New York of any valuable *franchise, not visible or tangible*, though such forfeiture might make the existence and operation of the railroad by the Receivers a physical or legal impossibility; in short, it was a final refusal to exercise any judicial power to preserve to the Receivers, in the interest of those whom they were appointed to protect, any interest in the intangible franchises under which the railroad was rightfully operated or had been rightfully operated.

To this extent, the decree was ultimate and final when made operative in the Court below; and since the attempt to take physical possession of visible and tangible property might never be made, the determination of the Court as to the franchise to operate was as final as it could under any circumstances ever become.

This is therefore not a case where this Court is without jurisdiction to review the action of the Circuit Court of Appeals, because of the piecemeal character of the appeal (*e. g. Collins vs. Miller*, 252 U. S. at p. 370; *U. S. vs. Beatty*, 232 U. S. 463; *Heike vs. U. S.*, 217 U. S. 423).

The franchise to operate is a distinct property, valuable in its nature; it is a single subject matter; it is capable of segregation; it is distinguish-

able and distinct; and it was so severed by the proviso inserted in the decree that it might be forever gone without judicial interference, and without the possibility of the Receivers ever being able to approach the Court for any further protection of the subject matter of the dispute with the City of New York; nothing of this subject matter was necessarily reserved for further consideration; nothing more remained to be done, forever to tie the hands of the Receivers and those whom they represented in respect to the forfeiture of the franchises, and the circumstances under which the Receivers were privileged to apply to the Court for further order might never arise.

THEREFORE, the decree of the Circuit Court of Appeals was final and complete, so as to confer jurisdiction of this appeal upon this Court. It is only necessary to contrast the full reservation in the order of the District Court, which it was optional with the City to invoke, with the meagre possibility that new circumstances might arise entitling the Receivers to avail themselves of the limited privilege presented by the decree of the Circuit Court of Appeals, to show that the latter decree was both final and complete in itself, while the former was purely interlocutory and wholly incomplete.

The "without prejudice clause" in the decree of the Court of Appeals was a limitation of its scope by way of definition of its terms, and not a limitation either of its finality as to time, or of its completeness as to subject matter; the lapse of no time could limit its effect; and nothing but new circumstances could limit its completeness; and it could never be less complete as to its own subject matter.

Our case, therefore, unlike the illustrative case of *Collins vs. Miller* (*supra*, p. 45), does fall with-

in those cases of which this Court has jurisdiction illustrated by

Forgay vs. Conrad, 6 How. 201;
Thomson vs. Dean, 7 Wall. 342;
Trustees vs. Greenough, 105 U. S. 527;
Williams vs. Morgan, 111 U. S. 684;
Trust Co. vs. Grant Locomotive Works,
 135 U. S. 207.

If this decree is not now reviewed, it can never again be reviewed in any judicial tribunal; the franchises may be forever lost, and no reservation or limitation will preserve them. Whether the City refrains or not from any claim to visible or tangible property in the possession of the Receivers, nevertheless by the passage of the Resolution, without judicial interference, it can effectually wreck the railroad as an operating entity of value (see *People vs. O'Brien*, 111 N. Y. 1, at p. 47). A decree making this course possible without any possibility of judicial review is as final and complete as any judicial action which can be conceived.

We therefore respectfully insist that *beyond peradventure this Court has jurisdiction of this appeal*, and we accordingly proceed to consider its merits.

It is proper for this Court to decide whether the Circuit Court of Appeals erred in its determination of the facts.

As Federal questions were raised in the District Court, both the facts and the law on this appeal may be reviewed, and such relief granted as may be proper under the circumstances disclosed, irrespective of the disposition that may be made of the Federal questions. This Court will review

all questions involved in the case, whether resting upon State or Federal law.

Ohio River & W. R. Co. v. Dittey, 232 U. S. 576;

Louisville & N. R. Co. v. Greene, 244 U. S. 522;

Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S., 446.

In *Louisville & N. R. Co. v. Greene* (*supra*), the Court said:

"Of course, the Federal jurisdiction, having been invoked upon the substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon State or Federal law."

In *Cincinnati v. Cincinnati & Hamilton Traction Co.* (*supra*), the Court said:

"As the cause is here upon appeal, it is subject to review upon both law and fact; we should grant the relief proper under circumstances now disclosed."

THE FACTS.

Under the Contract with the City the Traction Corporation was not required to extend its road until the appellee took title to the streets involved and regulated and graded the same; this essential condition precedent had not been performed by the appellee on February, 16, 1917, when it adopted its resolution directing the extension in question.

On page 9 of this brief (*supra*), subdivision Seventh of Section 3 of the franchise, as amended January 21, 1916, is set forth in full; this subdivi-

sion contains the requirements of the contract as to the construction and the times of putting in operation the different sections of the railway of the Traction Corporation. Said subdivision required the Traction Corporation to construct and put in operation five separate sections of its railway within designated times. Each section was, by virtue of said subdivision, treated as a separate and distinct unit. The Circuit Court of Appeals supports this obvious construction:

“An examination of the franchise contract and its amendments shows that the intention of the parties was that the railway was to be constructed in separate sections as the respective sections of territory to be traversed became populated and developed, and streets were established therein.” (Transcript, p. 149.)

Four of these five sections had been constructed and put in operation by the Traction Corporation within the times required by said subdivision Seventh of Section 3 of the franchise as amended. What was the franchise requirement as to the construction and putting in operation of this fifth or last section of the road, is a question under review upon this appeal.

[A map or diagram of the following discussion of the facts is inserted at page 69 of this brief, and is now referred to for its graphic showing of the facts.]

The route comprised in this last section of the road is shown upon map No. 2 (Transcript, 181), which is from the intersection of Sutphin Road with Lambertville Avenue over Lambertville Avenue, and other streets, to the City line at Nassau County, a distance of over four miles. Appellants respectfully call the Court's especial attention to the fact that the resolution of the Board of Esti-

mate and Apportionment of appellee, adopted February 16, 1917, directing the Traction Corporation to make the extension in question, did not require the Traction Corporation to extend its road to the full length of the fifth or last section ending at the City line, but required the Traction Corporation to extend only to Springfield Road, a distance of some 3.3 miles. At this stage of the brief the appellants are not considering the right of the appellee to direct the Traction Corporation to make an extension of less than the whole of the remaining section. What the appellants do contend at this point is that before the appellee could direct the Traction Corporation to make the extension in question, the appellee must first have taken title and regulated and graded *all* the streets involved in the fifth or last section of the road. The appellee, in its brief in the Circuit Court of Appeals, took the position that the matter of title or regulating and grading beyond Springfield Road was one of no consequence, since the Traction Corporation had been ordered to extend its railway only to Springfield Road. This contention of the appellee is negatived by the language used in said amendment to the franchise, which plainly states that the Traction Corporation shall construct and put in operation the remainder of its railway (that is, the fifth or last section), as directed by the appellee, subject, however, to the following proviso: "*provided that title to the streets involved has been vested in the City and that said streets have been regulated and graded.*" (Transcript, p. 70.)

In any event, the answer of the appellee estops it from raising this contention, for the reason that it has itself, in defining what is meant by the

"streets involved," alleged in its answer as follows:

"The words 'streets involved' used in the amendment of January 21, 1916, of the contract of October 29, 1912, means the streets originally mentioned and involved in said contract of October 29, 1912. * * *" (Transcript, p. 90.)

The streets originally mentioned, between the intersection of Sutphin Road and Lambertville Avenue and the City line in the contract of October 29, 1912, are as follows:

"Lambertville Avenue from Sutphin Road to Spangler Street; Spangler Street from Lambertville Avenue to Brinkerhoff Avenue; Brinkerhoff Avenue from Spangler Street to Smith Street; Smith Street from Brinkerhoff Avenue to Ulster Avenue; Ulster Avenue from Smith Street to Westchester Avenue; Westchester Avenue from Ulster Avenue to the line dividing the City of New York from the County of Nassau." (Transcript, p. 40.)

Appellants' petition and the appellants' reply also allege that the streets designated above are the streets involved, which allegations are not controverted by the appellee. (Transcript, pp. 8-9, 87, 109.)

Irrespective, however, of the allegations of the parties, the term "streets involved" as used in the amendment of said franchise contract dated January 21, 1916, can, of course, mean no other than the streets designated in the original grant as constituting the route between the intersection of Sutphin Road and Lambertville Avenue, and the City Line at Central Avenue. These streets are named above.

The provision requiring the appellee to take title and regulate and grade the streets for the full length of the last section, before the Traction Corporation could be directed to construct and put in operation such section, was one material to the Traction Corporation, in that the Traction Corporation should not, in justice, be required to extend its road into a section in advance of development.

Therefore, it was incumbent upon the appellee to show conclusively that on February 16, 1917, when it adopted, by its Board of Estimate and Apportionment, the resolution directing the Traction Corporation to make the extension in question, it had performed on its part, that is, had acquired title and had regulated and graded the streets involved. Having in view the fact that the appellee was attempting to compel the Traction Corporation to extend its line into an unprofitable and undeveloped territory at a time when labor was scarce, wages abnormally high, materials impossible to acquire at any cost and governmental war regulations made it the duty of the Traction Corporation to defer work (Transcript, pp. 11, 13, 15, 16, 25, 88), it is just that the appellee be required to show beyond controversy that it had performed all on its part to be performed before it could call upon the Traction Corporation to proceed. Irrespective, however, of this requirement, the record is clear, from the admissions of the appellee in its answer, the affidavits of its officials and official maps, submitted upon the hearing on its behalf, that title was not, in fact, on February 16, 1917, vested in the appellee as to a material portion of the streets involved in the extension ordered to Springfield Road, and title was

not vested at all beyond Springfield Road; and the greater portion even in the extension directed was not regulated and graded.

(a) *Portions of the streets involved, as to which the appellee, The City of New York, had not acquired title on February 16, 1917* (see map at p. 69 of this brief) :

The allegations and admissions of the appellee in its answer, the affidavits of its officials, together with the official maps submitted by appellee upon the hearing, show that title was not vested in the City of New York on February 16, 1917, to the following portions of the streets involved :

1. That portion of Lambertville Avenue occupied by the right-of-way of the Long Island Railroad between Freehold and Carlisle Streets.

2. That portion of Westchester Avenue occupied by the right-of-way of the Long Island Railroad between Caxton Avenue and Montauk Avenue.

3. Title to that portion of Westchester Avenue and 117th Avenue, lying between Merrick Road and Springfield Road, was not vested in the City of New York to the full legal width as laid down on the official maps of the City of New York in existence at the time of the amendment of the franchise of January 21, 1916, and at the time of the adoption of the resolution of February 16, 1917.

4. All of that portion beyond Springfield Road to the City line.

Considering these in order :

1. Lambertville Avenue is admittedly one of the streets involved in the said extension of the road

of the Traction Company ordered by the City of New York (Petition par. 12, p. 10; Answer par. 5, p. 88).

The City admits in paragraph ninth of its answer that "the City of New York did not acquire title in fee to the roadbed of the Long Island Railroad Company where it crosses Lambertville Avenue near Carlisle Street; that said Avenue is not physically open across the Long Island Railroad at this point for vehicular traffic. * * *" The Board of Estimate and Apportionment of the City in taking title to Lambertville Avenue, by its resolution of December 10, 1915, specifically excepted title to this right of way of the Long Island Railroad (Transcript p. 20).

The petition of the Receivers in paragraph XVI (p. 12) alleges that its franchise contract with the City of New York prohibits it from crossing said Long Island Railroad at Lambertville Avenue at grade, and that it has not acquired the "legal right to cross said right of way at said point at grade or otherwise and crossing of said tracks of the Long Island Railroad at such point would involve the construction of overhead trestles." Paragraph Fourth of the answer (p. 87) admits all of said paragraph XVI of Receivers' said petition.

It is thus established by the admissions in the answer of the City that Lambertville Avenue, where it crosses the right of way of the Long Island Railroad, is one of the streets involved; that title to Lambertville Avenue, at said crossing, was not acquired by the City of New York, at the time it adopted its resolution directing the Traction Corporation to extend its road over said crossing; and that the Traction Corporation at

said time did not have the legal right to cross the right of way of the Long Island Railroad at said point.

In spite of these admissions and in contradiction to them, it is alleged in the defendant's answer that the words "streets involved" used in the amendment of January 21, 1916, of the contract of October 29th, 1912, refer "solely to the streets and portions of streets actually owned by and belonging to the City of New York and not the streets or portions thereof as they are proposed on the final map of the City of New York" (transcript p. 90); and also that "under the Railroad Law the said Traction Corporation has the arbitrary right to build its line across the Long Island Railroad where it crosses said avenue and without getting the permission of said Long Island Railroad and by taking the steps in said Railroad Law prescribed."

Even were it open to the City, in spite of its said admissions in its answer, to raise these contentions, it becomes readily apparent upon examination that they are without merit. It is sufficient answer to the contention that the use of the words "streets involved," in said paragraph seventh of Section 3 of the franchise contract, as amended January 21, 1916, refers only to said streets as to which the City of New York then has title, to observe that the words obviously refer to the vesting of title in the future and not to title then vested. Otherwise there would be no point in providing that the Traction Corporation could not be compelled to extend its road until title to the streets involved had been vested in the City of New York, if in fact title was then already vested. Obviously the parties have in mind title to the

streets that will be acquired by the City in the future as laid out in the final Map of the City of New York. At the time of this resolution ordering the extension in question, Lambertville Avenue had already been laid out on the final map of the City of New York as amended February 19, 1915 (Transcript p. 91) and as laid out is a street extending across the said right of way of the Long Island Railroad as more particularly appears from the official damage map of the City, giving that part of said street, where it crosses said right of way, damage parcels numbers 74 and 75 (Map No. 4, Transcript, p. 183). Thus it is evident from the official maps in existence at the time of the amendment of the Traction Corporation's franchise of January 21, 1916, that Lambertville Avenue crossing the Long Island Railroad right of way is a part of Lambertville Avenue. The City's contention that Lambertville Avenue, where it makes said crossing of the Long Island Railroad, is not a part of the City's street involved in the extension ordered, is further negatived by the fact that the City itself instituted proceedings before the Public Service Commission, under Section 90 of the New York Railroad Law, pursuant to resolution of its Board of Estimate and Apportionment, dated September 19, 1912, to determine whether Lambertville Avenue, a proposed new street, should pass over or under or at grade of the tracks of the Long Island Railroad Company. Pursuant to such application an order was made by the Public Service Corporation dated November 19, 1912, requiring that Lambertville Avenue shall be constructed by the City of New York to pass under the tracks of the Long Island Railroad (transcript p. 113). If the City of New York did not intend at some time to construct Lambertville Ave-

nue across the said Long Island Railroad and to take title to that portion of said avenue, it scarcely would have applied to the Public Service Commission for an order to determine at what grade said avenue was to cross said railroad, nor would it have filed its official maps showing Lambertville Avenue crossing said railroad and give to said crossing damage parcels numbers.

Concerning the allegation of the City in its answer that the Traction Corporation has the arbitrary right to build its line across the right of way of the Long Island Railroad, no particular section of the Railroad law applicable is referred to. The only section of the Railroad Law that has any application to this situation is section 90, which states in part as follows:

“When a new street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road * * * shall hereafter be constructed across a steam surface railroad, * * * such street, avenue, highway or road, or portion of such street, avenue, highway or road shall pass over or under such railroad or at grade as the Public Service Commission shall direct.
* * *”

and, as has been already noted, the City of New York did apply under that section for an order of the Public Service Commission to determine the grade of such crossing. It was asserted by the City, in its brief before the Circuit Court of Appeals, that Section 22 of the New York Railroad Law gave the Traction Corporation the arbitrary right to cross the tracks of the Long Island Railroad. A reading of this section demonstrates that it is without application to this situation. Section 22 provides for the intersections of railroads

by agreement between the intersecting railroads. In the event that the two railroads cannot agree, it then provides as follows:

“If the two corporations cannot agree upon the amount of compensation to be made therefor, or upon the line or lines, grade or grades, points or manner of such intersection and connection, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor appointed by the Court as provided in the Condemnation Law. Such commissioners may determine whether the crossing or crossings of any railroad before construction shall be beneath, at or above existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. * * *”

There is nothing, however, in the franchise contract of the Traction Corporation, which makes it incumbent upon it to enter into an agreement with the Long Island Railroad Company to make this crossing. The fact, of course, is that under the proviso in question, it was the duty of the City by condemnation proceedings to take title to the fee of said crossing and construct said Lambertville Avenue across said Long Island Railroad, as required by said order of the Public Service Commission under said Section 90 of the Railroad Law. Until the City had done this it was not in position to direct the Traction Corporation to proceed.

That it was a matter of no small moment to the Traction Corporation for the City thus to first prepare the way, scarcely admits of doubt. If the way were prepared, as ordered by the Public Service Commission, the Traction Corporation could then have run its tracks across upon the estab-

lished permanent grade of Lambertville Avenue. In the absence of the City so constructing its street across the Long Island Railroad, the Traction Corporation in order to make such a crossing would have to acquire a private right of way, construct an expensive trestle and carry its tracks by a trestle on private right of way over the tracks of the Long Island Railroad Company, for a considerable distance. A map prepared by Mr. Clifford B. Moore, consulting engineer for the City of New York (Map No. 12, transcript p. 191) showing a profile of this proposed temporary crossing by trestle of the Long Island Railroad, extending approximately four city blocks, from Hoboken Street to Newark Street, and reaching an elevation of 49 feet, gives some idea of the large expense to which the Traction Corporation would be put to make this temporary crossing. It is, therefore, evident that performance by the City of its prior obligation to prepare the way is one material to the Traction Corporation. In the absence of some requirement in the franchise no reason is apparent why the Traction Corporation should relieve the City of its obligation and itself assume in the place thereof an unjustifiable burden.

Although it is conceded that the Traction Corporation did not acquire and did not have the legal right to cross the tracks of the Long Island Railroad at this point, it is nevertheless suggested that the Traction Corporation might have made an agreement with the Long Island Railroad Company for permission to construct, at the Traction Corporation's expense, a temporary trestle over the Long Island right of way. In the absence of any provision in the franchise or in law requiring the Traction Corporation to make such an agreement, there is no valid reason why it should do

so to its very great detriment (Transcript pp. 12, 87, 92).

While the failure of the City to acquire title to the Lambertville Avenue crossing of the Long Island Railroad and to construct said avenue across said railroad, as is required of it under Section 90 of the Railroad Law, represents comparatively only a small part of the want of performance of the condition on City's part first to be performed, as will more particularly hereafter be demonstrated, yet it is respectfully submitted this one failure is in itself sufficient to justify the Traction Corporation in not complying with the City's said resolution of February 16, 1917, directing the Traction Corporation to construct where the City did not have title.

2. Title to that portion of Westchester Avenue involved in the extension directed by the appellee's resolution of February 16, 1917, occupied by the right-of-way of the Long Island Railroad, between Caxton Avenue and Montauk Avenue, was not vested in the appellee at the time of said resolution.

This is proven by the affidavit of Frank B. Tucker, City Engineer, submitted on behalf of the appellee, wherein he says:

"That the title in fee to all of old Central Avenue, between Merrick and Springfield Roads, except the crossing of the Montauk Division of the Long Island Railroad, is in the City, in accordance with the resolution of the Board of Estimate and Apportionment on February 16, 1917, etc." (Transcript, p. 102).

The "old Central Avenue" referred to is now Westchester Avenue, at said crossing of the Long Island Railroad, as shown by appellee's map No. 6 (Transcript, p. 185).

Here again the Traction Corporation, to comply with the resolution to extend its road, would have to acquire private right-of-way and build an expensive temporary trestle on such private right-of-way over the right-of-way of the Long Island Railroad, under agreement with it. Whereas, had the appellee acquired title to Westchester Avenue at such crossing and had it obtained the order of the Public Service Commission allowing it to construct said avenue under the tracks of the Long Island Railroad at said point, as was its duty to do (Railroad Law, Section 90), the Traction Corporation could then have placed its tracks in a permanent location in said avenue at said point, with little expense.

3. Map No. 6, submitted on behalf of the appellee, shows that the portion of the streets involved, consisting of Westchester Avenue and 117th Avenue between Merrick Road and Springfield Road, is laid out by the appellee as an eighty-foot street, which said map bears date August 14, 1915, and was adopted by appellee's Board of Estimate and Apportionment, November 12, 1915 (Transcript, p. 185). The appellee, The City of New York, however, in taking title to said portion of Westchester Avenue and 117th Avenue, extending between Merrick Road and Springfield Road, did not take title to the full width of said street, but only took title to a portion in the centre thereof, that is to say, to a width of fifty feet, instead of eighty feet, as laid out on its said map No. 6. (Transcript, p. 102, maps Nos. 8 and 9, pp. 187, 188.) The significance of this is that the appellee, The City of New York, did not take title to the full width of said street, and that any tracks laid by the Traction Corporation would be only in a *temporary location*. Upon the appellee taking title to the full width and regulating and grading

said Westchester Avenue and 117th Avenue between said streets, the Traction Corporation would be compelled to remove its tracks at great expense to itself,—the very thing which, by the amendment of January 21, 1916, it was sought to avoid. That the tracks laid in Westchester Avenue and 117th Avenue, between Merrick Road and Springfield Road, would be only a temporary location is shown by the affidavit of the Consulting Engineer of the appellee, Clifford B. Moore, who prepares and annexes to his affidavit a map showing the proposed location of the tracks of the Traction Corporation giving the same a temporary location for this distance from Merrick Road to Springfield Road, being easily more than one-half of the distance of the extension in question (Transcript, p. 117).

4. The appellee, The City of New York, had not vested title on February 16, 1917, to that portion of the streets involved between Springfield Road and the City line. A report of Nelson P. Lewis, Chief Engineer of the appellee, dated February 14, 1917, and contained in the minutes of the Board of Estimate and Apportionment of appellee of February 16, 1917, as to the vesting of title, has this to say with regard to that portion between Springfield Road and the City line:

“The traveled portion of the road between Springfield Road and the City line is covered by one additional damage parcel, but it is understood that the Borough President does not at this time care to have title vested in any portion of the street beyond Springfield Road” (Transcript, p. 108).

Again, the affidavit of Frank B. Tucker, City Engineer, submitted on behalf of the appellee, shows that title in fee was vested in the appellee,

by resolution of the Board of Estimate and Apportionment, adopted February 16th, 1917, to all of old Central Avenue, between Merrick and Springfield Roads, within the lines of damage parcels Nos. 8, 29, 46, 56, 140-150 inc., 152, 180 and 199, shown on the draft damage maps in four sections (Exhibits 8, 9, 10 and 11, Transcript, pp. 187-190). The portion between Springfield Road and the City line is shown on damage map No. 11 (Transcript, p. 190) as damage parcel 203. The affidavit of said Tucker shows that title to said damage parcel 203 was not included in those acquired by the appellee by said resolution of February 16th, 1917 (Transcript, p. 102).

The appellee recognizes it has not vested title to all the streets involved in the remaining portion of the road. This is shown by the position in its brief in the Circuit Court of Appeals that it was immaterial that title to all the streets involved had not been vested in it, for the reason that by its resolution it had not directed the Traction Corporation to construct and put in operation the railway beyond Springfield Road. The insufficiency of this position and the fact that the appellee is, by its own answer, estopped to take the same, has already been considered (*supra*, p. 50).

(b) *Portions of the streets involved which had not been regulated and graded by the appellee, The City of New York, on February 16, 1917.*

(See map at p. 69 of this brief.)

The amendment of January 21, 1916, to the franchise of the Traction Corporation further required the appellee to regulate and grade the streets involved before it could direct the Traction Corporation to construct and put in operation the extension in question. What, therefore, is meant

by the use in said amendment of the words "provided * * * that said streets have been regulated and graded"? Looking to the situation of the parties at the time of the franchise amendment of January 21, 1916, it cannot be controverted but that the regulating and grading in question is to be done by The City of New York and in the future. Concededly, there would be no purpose in putting such words in the amendment if the streets involved were then already regulated and graded. When the appellee, The City of New York, obligates itself in a grant from it to regulate and grade its own streets, before a right accrues to it to compel the Traction Corporation to extend, the fair inference is that The City of New York intends and means by the regulating and grading of its own streets, the regulating and grading required by its official maps adopted by its Board of Estimate and Apportionment establishing the location, widths and grades of its streets, in compliance with statutory enactments. It would seem self-evident that the only grade the City's streets can have, when regulated and graded, is the grade established by its own maps made official in pursuance of statutory mandate.

By Section 439 of the Charter of the City of New York it is provided that the President of each borough within the City shall prepare maps showing the streets in his borough, as to which no map has been finally established and adopted. Whenever and as often as any map is completed of a part of his territory, he shall report the same, together with the surveys, maps and profiles showing the streets laid out by him and the grades thereof to the Board of Estimate and Apportionment for its approval. The said Board shall, with such modifications as it desires to make, cause such map and profiles, as finally adopted by it, to be filed. This section further provides:

*"Such map and profiles, when so adopted and filed, shall become a part of the map or plan of The City of New York, and shall be deemed to be final and conclusive with respect to the location, width and grades of the streets shown thereon. * * *"*

From this record it appears affirmatively that, as provided by Section 439 of the New York City Charter, an official profile and map of Lambertville Avenue, from the intersection of Sutphin Road to Merrick Road, dated February 21, 1916, was adopted and filed. (Map No. 7, Transcript, p. 186; affidavit of Ashmead, p. 96.) Likewise, it appears, an official map for the balance of the route to the City line, showing the width and grade of Westchester Avenue, 117th Avenue and Dearborn Avenue, dated August 14th, 1915, was adopted by the Board of Estimate and Apportionment on the 12th day of November, 1915, and filed in the Topographical Bureau of the Borough of Queens, February 16, 1916 (Map No. 6, Transcript, pp. 185, 102).

Appellants contend that appellee's right to compel the Traction Corporation to extend its road did not arise until the streets involved had been regulated and graded to legal grade shown upon appellee's official map. The appellee's contention to the contrary, namely, that a temporary grade or any temporary location that the City authorities were willing to accord the Traction Corporation for its tracks, irrespective of the fact that there had been no regulating or grading of the streets at the place offered for such location, satisfies the franchise requirement of regulating and grading, will not stand the test of analysis. Argument is not required to prove that the appellee has not complied with its undertaking to regulate and grade streets, where it admits

there has been no regulating or grading by it. The appellee cannot excuse the fact that it has not regulated and graded a particular street by a showing that long previous to the adoption of the official map of that street and before the territory in which the street lies became a part of the City of New York, sixteen or eighteen feet of the eighty-foot width established by the official map had been macadamized at a grade approaching or approximating within a few feet the grade established by the official map (Transcript, p. 102-3). Particularly is this so, where the temporary location offered by the City authorities for the tracks of the Traction Corporation is beyond the macadam and in a part of the street where the City makes no showing there has been any regulating or grading whatever by it or any one else. To compel the Traction Corporation to make a temporary location of its tracks upon the ungraded portion of a street, which tracks it will be compelled to remove and relocate, at great expense to itself, as soon as the City regulates and grades the streets to the official grade, would be an obvious injustice. To hold that permission to locate tracks temporarily in an ungraded portion of the street was the sort of regulating and grading of the streets contemplated by the franchise, is to make a nullity of the provision that the City shall first regulate and grade. In other words, this construction, in practical effect, eliminates the proviso in question from the franchise.

The record made by the City itself, when called upon by the District Court to show cause, fully establishes the fact that it did not regulate and grade, (1) that portion of Lambertville Avenue between Freehold and Medford Streets at other than a temporary grade, and (2) did not, in fact, regulate or grade at all Westchester Avenue and 117th Avenue (which constitutes considerably

more than one-half of the distance of the extension the Traction Corporation was directed to make), or the portion beyond Springfield Road to the City line, although there had been previously adopted, as aforesaid, by the Board of Estimate and Apportionment, and filed, the official map of Westchester Avenue and 117th Avenue and the portion (Dearborn Avenue) beyond Springfield Road.

Taking up in order the City's failure to regulate and grade:

1. Lambertville Avenue, one of the streets involved, concededly was, on February 16, 1917, at a temporary grade for that portion thereof between Freehold Street and Medford Street. Appellee's answer admits this (Transcript, p. 88), as does the report of appellee's Engineer of Highways, J. J. Blake (Transcript, p. 75), and the affidavit of Joseph L. Ashmead, one of the appellee's engineers (Transcript, p. 96). Such fact is also shown by the official profile map, dated February 21, 1916, submitted upon behalf of the appellee. (Map No. 7, Transcript, p. 186.)

To hold that when the City has brought a street to only a temporary grade, it has complied with the franchise requirement as to regulating and grading, strips the word "regulated" of all meaning. Conceivably, if the proviso in question had been "provided the streets involved had been graded," and no regard were had for its evident purpose or to the charter requirements as to grading, then there might be some room for an argument that a street is graded when it has only a temporary grade. The word "regulated," in the context in which it is used, imports the idea of a permanent or final, as distinguished from a temporary grade. The mere statement that a grade is temporary carries with it notice that a change of grade is imminent.

The consequence in the instant situation of adopting the construction contended for by the appellee is that the Traction Corporation, at its own expense, must provide funds for a costly temporary construction, assuming it could obtain, by agreement with the Long Island Railroad, its consent to a trestle over its right-of-way. Since the City did not have title to that part of Lambertville Avenue occupied by this right-of-way, or any right therein, no crossing of any kind could be had without the consent of the Long Island Railroad.

The reason why the City refrained from taking title to the portion of Lambertville Avenue where it crosses the right-of-way of the Long Island Railroad, is apparent. The territory had not become sufficiently developed to warrant the City's incurring the expense of grading and opening the street at this crossing. From the City's point of view it would be a better arrangement to let the Traction Corporation incur the large expense of making, by a temporary trestle, a crossing, rather than for the City itself to regulate and grade its street at this point, as required by said order of the Public Service Commission. That the territory at this point was in a state of undevelopment may fairly be inferred from the fact that this so-called street was shut off at this right-of-way by the fence of the Long Island Railroad on either side of the right-of-way (Transcript, pp. 11, 88).

2. Westchester Avenue and 117th Avenue (constituting more than one-half of the extension the Traction Corporation was directed to make) and Dearborn Avenue (being that part of the streets involved beyond Springfield Road to the City line) were never regulated or graded at all by The City of New York.

Proof of this statement is found in the following:

The affidavit of Joseph L. Ashmead (Transcript, p. 96), submitted on behalf of the appellee, shows that he was the engineer of the City in charge of regulating and grading, and that only Lambertville Avenue and Ulster Avenue to Merrick Road of the streets involved were regulated and graded in accordance with the official map.

The report of J. J. Blake, appellee's Engineer of Highways, bearing date of February 19, 1917, found at page 74 of the Transcript, recites, in effect, that he has been asked to report as to what streets title has been taken to Springfield Road and what portion of the same had been regulated and graded to the proper width "as per the last map of The City of New York, adopted by the Board of Estimate and Apportionment." The report then continues to the effect that regulating and grading, at the legal grade and full width, in accordance with the official map, has been done by The City of New York, or contract let therefor, as to all the streets involved up to the intersection of Ulster Avenue at Merrick Road, with the exception of Lambertville Avenue, between Freehold Street and Medford Street, which shall be graded to a temporary grade. This report then adds:

"No work has been done on ^{Central} ~~Lambertville~~ Avenue between the Merrick Road and Springfield Avenue except the laying of an asphaltic concrete pavement sixteen feet in width, which is approximately to the grade shown on the final map."

The fact is the record does not show that any regulating and grading whatever was done by The City of New York as to that part of the streets involved between Merrick Road and Springfield Road, or beyond Springfield Road to the City line.

The paucity of information in respect to when, how and by whom this narrow strip of asphaltic

pavement was constructed is the more significant when construed in the light of the request for information and contrasted with the detailed information furnished showing that the regulating and grading by The City of New York on Lambertville Avenue, up to Merrick Road (one-half the distance of the extension directed) is, or is to be, to the width and grade required by the official map, except the temporary grade at the Long Island Railroad crossing.

If the quoted statement from the report of engineer Blake is intended to convey any implication that there was some regulating and grading done by The City of New York, although not at the official grade, between Merrick Road and Springfield Road, such implication is easily refuted by the record.

The official map of said street between Merrick Road and Springfield Road, No. 6 (Transcript, p. 185), was adopted and filed, as required by Section 439 of the New York Charter, November 12th, 1915. Necessarily, any grading done by The City of New York would be in accordance with that map. The City of New York had done no regulating or grading by February 16, 1917 (the date of its resolution directing the Traction Corporation to extend), since on that very day, by resolution of its Board of Estimate and Apportionment, it took title to the portion between Merrick Road and Springfield Road. The City of New York is not likely to regulate and grade a street laid out on its final map before it has taken title. It is also evident that the proviso in the franchise amendment of January 21st, 1916, that the City shall first regulate and grade means the regulating and grading the City will do in the future, and that means regulating and grading in accordance with its own maps.

If further proof were required to show that this part of the extension ordered was never regulated

or graded by the City of New York, the same is furnished by the affidavit of Clifford B. Moore, Consulting Engineer, submitted on behalf of the appellee found at page 117 of the transcript, where he states that he has prepared a plan showing the location of tracks which the President of the Borough of Queens is willing to grant to the Traction Corporation on the streets comprised in the extension directed. This map he states shows that the location on Lambertville Avenue, between Sutphin Road and a point about 125 feet east of Hoboken Street, "is permanent as to lines and grades"; that between the point 125 feet east of Hoboken Street and Medford Street the temporary overhead crossing of the Long Island Railroad occurs, and that this location is temporary only. He further shows that the proposed location upon the balance of Lambertville Avenue and upon Ulster Avenue to Merrick Road "is permanent as to lines and grades," and then adds as follows:

"Upon Westchester Avenue, 117th Avenue and Dearborn Avenue, between Merrick Road and Springfield Road, the location is temporary, but no change should be rendered necessary within a space of seven years, at least five, and probably more than ten."

The maps annexed showing the location offered by the Borough President for the Traction Company's tracks are marked in the transcript numbers 12, 13 and 14, and are found at pages 191-193. Map No. 14 shows the proposed temporary location for the tracks from Merrick Road to Springfield Road.

When it is realized that this proposed temporary location of the tracks is for a distance which constitutes the greater portion of the extension directed, some conception can be had of the great expense to which the Traction Corporation would be put when required to take up and to make a

permanent location of its tracks, and the absolute unfairness of compelling it to assume such expense in the face of a contrary intention of the proviso requiring The City of New York to first regulate and grade. And it is respectfully submitted that the generous intimation contained in said Moore affidavit, that the Traction Corporation might not be called upon for five years or more to incur this expense of relocating its tracks from the temporary location so offered to the permanent grade required by the City's official map, does not in any wise relieve the City from its prior obligation to first regulate and grade the location so offered before it can direct the Traction Corporation to construct its tracks thereon.

It may be noted in passing that whenever the officials of The City of New York in the record refer to regulating and grading by the City of New York, they speak always of regulating and grading to the grade shown upon official maps, or where they speak of a permanent location they mean a location at the grade established by official maps.

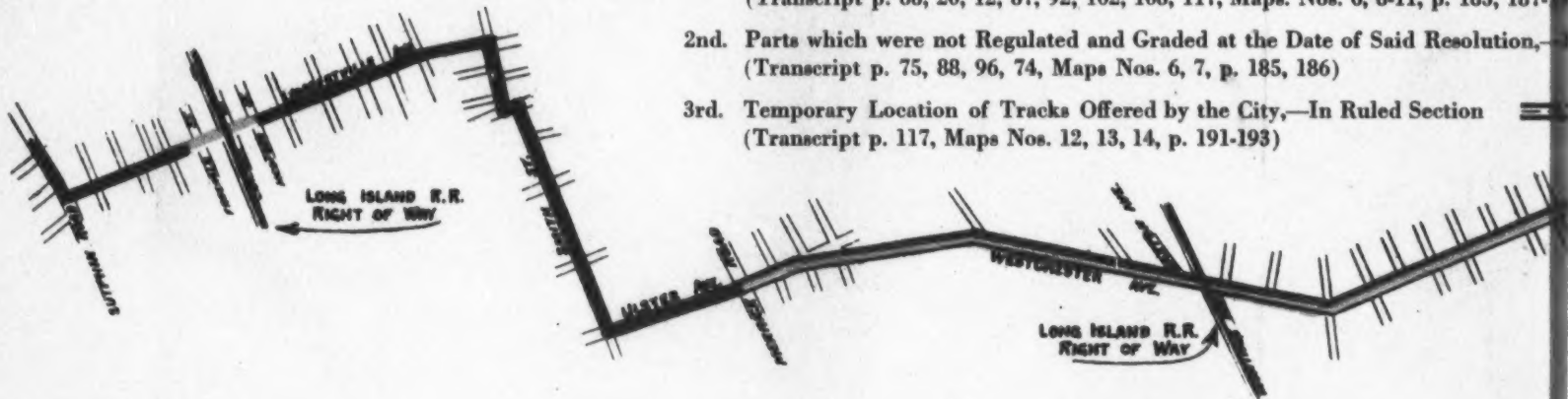
3. Likewise, there is no pretense by the appellee that the part beyond Springfield Road to the City line has been regulated and graded. The appellee is content to take the same position in this as in the case of its failure to vest title beyond Springfield Road, namely, it is immaterial, since the Traction Corporation was directed to construct only to Springfield Road. The insufficiency of this position has been considered at page 50 of this brief.

Graphic demonstration of the failure of the City of New York to comply with conditions precedent imposed upon it by the contract.

There is inserted here for the purpose of graphically illustrating the appellant's conten-

Map of Streets Involved in Extension of Route of Manhattan & Queens Traction Corporation Order of Board of Estimate and Apportionment, Dated Feb. 16, 1917, Extending from the Intersection of Lambertville Avenue to Springfield Road, a Distance of 3.3 Miles; and Also in That Part of Springfield Road to the City Line at Nassau County, Constituting with Extension Ordered the Full Route of Said Traction Corporation, 4.5 Miles in All.


- Showing:— 1st. Parts of Said Extension and Last Section as to which Title was not Vested in
(Transcript p. 88, 20, 12, 87, 92, 102, 108, 117, Maps Nos. 6, 8-11, p. 185, 187-19)
- 2nd. Parts which were not Regulated and Graded at the Date of Said Resolution,
(Transcript p. 75, 88, 96, 74, Maps Nos. 6, 7, p. 185, 186)
- 3rd. Temporary Location of Tracks Offered by the City,—In Ruled Section
(Transcript p. 117, Maps Nos. 12, 13, 14, p. 191-193)

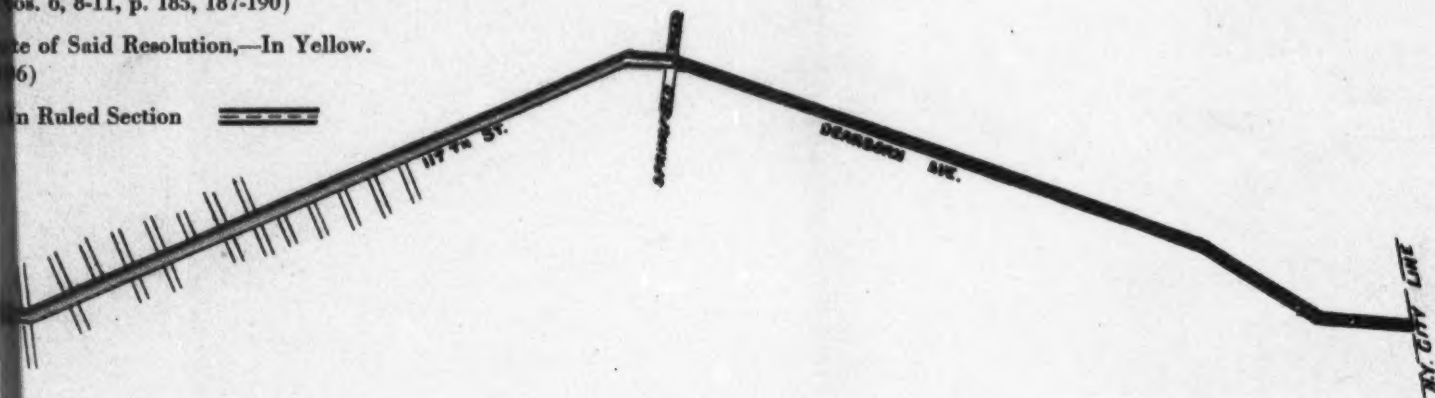


Section Corporation Ordered By Resolution
from the Intersection of Sutphin Road
and Also in That Part of the Route Beyond
Extension Ordered the Fifth or Last Section

Title was not Vested in the City of New York,—In Red.
(nos. 6, 8-11, p. 185, 187-190)

Date of Said Resolution,—In Yellow.
(186)

In Ruled Section 



tions respecting the facts of the failure on the part of the City of New York to perform the conditions precedent of acquiring title to the streets involved and regulating and grading them (*pro viso, supra*, pp. 10, 50), a map or diagram showing in detail

the parts of such streets whose title was not vested in the City of New York;
the parts of the streets involved which were not regulated and graded;
and the temporary location of tracks offered by the City.

(c) *Errors on the facts in the opinion of the Circuit Court of Appeals.*

The Circuit Court of Appeals in its opinion makes this plainly erroneous statement as to the vesting of title:

“We think too, that it plainly appears that title to the streets, except the crossing of the Long Island Railroad, is in the City, and as to that we have seen there is no obstacle in the way of construction of the trolley line by a trestle above” (Transcript, p. 147).

Appellants respectfully submit that instead of the record plainly showing any such fact, it has been demonstrated under this Point II(a) that the appellee, by its own answer and affidavits and official maps, establishes conclusive proof that it was not, on the 16th day of February, 1917, vested with title to the streets involved in: (1) that portion of Lambertville Avenue lying in the right of way of Long Island Railroad; (2) that portion of Westchester Avenue lying in the right-of-way of the Long Island Railroad; (3) a part of the width of the street extending from Merrick Road to Springfield Road, as shown upon appellee's official maps; (4) that part beyond Springfield Road to the City line.

What the learned Court means, when it says the crossing of the Long Island Railroad, presents

no obstacle, is not clear. There was, concededly, no legal right to cross, as the City had not vested title in itself, and had not regulated and graded or opened the street at that point, as required by the order of the Public Service Commission. It is possibly true that the Traction Corporation might have been able to have made a contract with the Long Island Railroad, and, at great expense, built a temporary trestle upon private right-of-way, but there is nothing in the franchise or in law that made it incumbent upon the Traction Corporation to make such agreement or to assume such expense.

The Circuit Court of Appeals states in its opinion as to regulating and grading:

“The record discloses that, with certain exceptions hereinafter referred to, the streets involved were graded to their full width and length” (Transcript, p. 147).

The only exceptions stated in the opinion are seven parcels on Lambertville Avenue where the grading was not completed to the full width, and the temporary grade at the Lambertville Avenue Long Island Railroad crossing. It is thus evident that the Circuit Court of Appeals, in its opinion, considered only the regulating and grading of Lambertville Avenue, which street constituted less than one-half of the distance of the extension the Traction Corporation was directed by the appellee to make. It completely *overlooked* that the appellee had not regulated and graded beyond Merrick Road, else it could not have made the statement that the streets involved “were graded to their full width and length,” for, as the record establishes by the appellee’s own answer, affidavits and maps, as hereinbefore shown under sub-division (b) of this Point II, no grading or regulating whatever was done by the City of New York be-

yond Merrick Road, which, as before stated, is less than one-half the distance to Springfield Road, the point to which the Traction Corporation was directed to extend.

The fact is, there is no basis for the conclusion of the Circuit Court of Appeals that the appellee had taken title to the streets involved and had regulated and graded the same within the meaning of the franchise requirement, and no warrant for its action in reversing the determination of the District Judge that the appellee had not performed the condition precedent on its part to be performed.

Nevertheless, assuming, for the purpose of argument, that appellee has performed on its part, the conclusions of law reached by the Circuit Court in its opinion are, as appellants respectfully submit, erroneous.

The action and reasons of the District Judge.

The District Judge enjoined (*supra*, p. 8) the contemplated action (Record, p. 125)

“without prejudice to any further or other application to this Court for the enforcement of any claim or right of the City of New York as to said matters”, and (p. 126)

“unless after further application to this Court” or (p. 126)

“until further order of this Court” or (p. 126)

“unless after order of this Court” (pp. 126, 127)

“except from taking steps to review or *modify* this order in the premises” (p. 127).

But he did not do this arbitrarily, for he wrote an opinion assigning his reasons (p. 133). In substance these reasons are:

1. that the "franchise," which the City proposed to forfeit, when properly construed, did *not* mean that its provisions authorized forfeiture of the parts and equipment of the railroad completed and in use under separable portions of the contract
and *also* forfeiture of the *whole* franchise because another separable part or extension was not completed on time;
2. that the order to perform is shown to have been impossible to perform;
3. that the City is not even now in a position to literally demand fulfillment by the railroad;
4. that the City is not in a position where it can insist that the road must at its peril perform literally all parts of the agreement;
5. that forfeiture of certain provisions, seemingly effected by lapse of time, should be without infliction of other penalties in other parts of the contract;
6. that the District Court has power to prevent interference with the property in possession of its Receivers;
7. that the protection of the Receivers will not deprive the City of its rights to sue or proceed against the Receivers;
8. that the Receivers only have in possession the title and property which was vested in the railroad;
9. That the injunction is not asked against the legislative power of the State;

10. but, against threatened action in taking property; the resolution being a step in its acquisition.

It will be noted that here were

- a. The construction of a written instrument (1; 5);
- b. the consideration of the facts disclosed by the papers before the Court (2; 3; 4);
- c. the application of law as considered by the Court (5; 6; 7; 8; 9; 10).

The injunction operated ("pending the result of the litigation in the main action"—p. 125) as a suspension of the enforcement of whatever right (if any) of the City there was, *until* the City should make application to the Court for leave to enforce it (when the Court could as a judicial matter, sever the lawful from the unlawful) or until "the further order of the Court."

This, we submit, was an interlocutory, and not a final, decree (*supra*, Point I),

and was based primarily upon

the Court's construction of a written instrument

(showing that the City was not vested with the entire right which it asserted)

and upon the Court's ascertainment that the facts, upon a proper construction of the instrument, did not justify the enforcement of the right reserved.

We respectfully insist, that the District Judge's construction of the instrument was correct; and that

his ascertainment of the facts was correct; and that

he applied the proper principle of law;
and
misapplied no principle.

The decision of the Circuit Court of Appeals.

As analyzed in the syllabus in *Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation; Petition of Begg*, 266 Fed. R. 625 (where this case is reported),

the Circuit Court of Appeals, by its opinion, decided:

1. that the order of the district court was a final order appealable within six months (a conclusion which we have controverted under Point I. above, pp. 27-44);

2. that the proceeding by Receiver's petition against the City, though not a party to the main suit, to restrain action to forfeit the franchise and property of the defendant traction company, was proper procedure;

3. that the Board of Estimate and Apportionment of the City, in granting and repealing franchises in the streets under authority vested in it by the City charter, acts in the exercise of legislative power and in a governmental capacity; (this we controvert below, p. 117 *et seq.*).

4. that, generally, a court of equity will not restrain the exercise of such power, though its contemplated action may be in disregard of constitutional restraints and may impair the obligations of contract;

5. that in the absence of other statutory direction, such legislative power may be exercised by either ordinance or resolution;

6. that the franchise was a contract; that by reason of its terms, in order to prevent a forfeiture, the traction company was bound to perform, unless performance is rendered impossible by act of God, the law, or the other party; (we show above, pp. 48-71, and below, p. 146 *et seq.*, that the conditions requiring performance had not been fulfilled by the City).

7. that in the absence of advance determination by the Legislature, the terms and conditions of grant and forfeiture are to be determined by the municipal body, which acts legislatively both as respects the grant and forfeiture; (the latter proposition we controvert below, p. 117 *et seq.*).

8. that an order for extension under the franchise which provided for such extension when the streets had been regulated and graded was not invalidated by the fact that the streets were not regulated and graded to their full width; (this we controvert below, p. 148 *et seq.*).

9. that the provisions of the specific franchise contemplated a forfeiture of the entire grant on failure to comply with any part of it, though the extension was to progress as settlement of the territory proceeded; (this we controvert below, p. 85 *et seq.*).

10. that acceptance of taxes did not waive the right to forfeit (this we controvert below, p. 113);

11. that a court of equity could not relieve from such a forfeiture; (this we controvert below, p. 165 *et seq.*).

12, 13, 14, 15, that as defined by the Court, the order appealed from was a final and not an interlocutory order; (this we have controverted under Point I above, pp. 27-44);

16. a definition of legislative power; (we controvert that the resolution of forfeiture would be an exercise of legislative power, below, p. 117 *et seq.*).

17. that "due process of law" does not require a judicial proceeding;

18. a definition of grading, as establishing a level and bringing the surface thereto; (this we controvert below, p. 146 *et seq.*).

It will be seen that the essence of the decision (apart from the questions 1. of jurisdiction, Point I, *supra*, pp. 27-44, and 2. propriety of procedure) lies in several subdivisions above enumerated (each of which we controvert).

3. that the authority of the City of New York was to be exercised (as contemplated) legislatively and in a governmental capacity;

4. that a court of equity would not restrain its exercise, though unconstitutional;

6. that (notwithstanding the forfeiture was legislative) the thing to be forfeited was a contract, which bound the traction company to perform unless rendered impossible by the same party thus entrusted with legislative power;

7. that the terms of forfeiture, as well as of the grant, are to be determined legislatively by the municipality;

8. that lack of complete regulation and grading of the streets did not invalidate a mandatory order for completion of the railroad over such incomplete streets;

9. that the terms of the franchise contemplated the forfeiture of the whole grant, for a failure to comply with any of its terms; though it also contemplated that the benefits

of the franchise should be utilized progressively from time to time; so that, for failure to extend, the pre-existing railroad might be wiped out;

We controvert the Court's conclusion that the traction company had failed to perform its contract obligation; as well as its conclusion that the right of forfeiture existed; and the correctness of its determination that no case was made for judicial interference.

It appears from the opinion (266 Fed. R. at page 627; transcript, p. 137) that the traction company, *in reliance* upon the contract, had built over 10 miles of street railroad within the time provided for such completion; and (p. 149) that it was the intent of the parties that it should be constructed in separate sections as the territory became populated and developed. In the face of this fact, we submit that the construction of the contract should be absolutely free from all doubt, and the fact of breach should also be absolutely free from all doubt, before *a court of equity* should reach the conclusion that a forfeiture of the whole was provided by the terms of the grant for a failure to extend, or that the right of forfeiture existed in fact. The situation is not one which should appeal to a Chancellor as meritorious unless the *right* of forfeiture very clearly exists or the power to restrain is obviously non-existent. And we shall show below that properly construed, and under the facts of the case the power of forfeiture did not exist and could not lawfully be exercised by the Board.

The condition precedent to completion or to forfeiture for non-completion.

Aside from the Receivers' contention that properly construed the contract did not provide for a forfeiture of the whole for non-compliance in part, the Receivers contended that it affirmatively appeared that the condition upon which the City had a right to demand the extension was non-existent. The *facts* we have shown above (pp. 48-71). We shall now analyze the *contract*.

This condition precedent was thus expressed in the contract (opinion, 266 Fed. R. at p. 628; transcript, p. 137; franchise contract, transcript, p. 22)

“provided that title to the streets involved has been vested in the City and that said streets have been regulated and graded.”

The extension with respect to which this proviso was to operate was to be made (franchise contract as quoted in Resolution for Completion, p. 22)

“within such time or times as may be directed by resolution of the Board upon recommendation of the President of the Borough.”

The resolution directing the extension (p. 22) required completion and operation from one designated point to another, stated in the opinion (p. 137; 266 Fed. R. at p. 628) to be a distance of 3.3 miles. Therefore, the right to direct completion did not reside in the Board, by the terms of the contract, *unless* the title to the streets involved had vested and they (that is, from end to end of the distance) had been regulated and graded.

The petition.

The Receivers disputed the right of the City upon specific grounds set forth in their petition (pp. 10, 11, 12) that title to certain of the streets involved and to certain portions of the width of certain other streets, and a certain crossing or crossings of the Long Island Railroad, which it was necessary to cross, had not vested in the City; and the petition further showed (pp. 10-11) that all of said streets were not regulated or graded to their legal grade or full width; that the right of way of the Long Island Railroad Company was fenced across one of the streets, which was not physically open; and that such street was not graded to its proper legal grade at this point, but only to a temporary grade; that when legally and physically opened and graded it would pass under the railroad under the order of the Public Service Commission (p. 11); it further showed (p. 11) that lines of poles upon part of the width of a certain street or streets, not acquired by the City, would interfere with the operation of the traction company's trolleys; and further (p. 12) that it could not, under its charter, cross the railroad, and that (p. 13) it had constructed a large part of the extension, but found it impossible to procure materials.

The answer.

By its answer to the petition (pp. 88-89) the City admitted that it had not acquired title to the roadbed where the Long Island Railroad crossed the street; it admitted that the street at this point was not open to vehicular traffic (p. 88) and that it was graded to temporary grade; it denied knowl-

edge or information of the allegation that when legally and physically opened and graded it would pass under the railroad tracks as set forth in the order of the Public Service Commission; it admitted the line of poles but alleged that consent could be obtained to their removal at the expense of the traction company; it showed that the franchise contract provided (p. 89) that the traction company might construct at its own expense temporary crossings of railroads for use until the grade of the street should be changed to avoid crossing such railroad at grade.

The answer alleged a specific meaning (p. 90) for the words "streets involved" as used in the contract alleged (p. 94); that the Receivers showed by their conduct that they did not intend to complete, alleged that the "streets involved" had been "fully prepared" for the construction, were "completely ready" for such construction, and a readiness for consents for the removal of the obstructing poles, and the legal right of the traction company to build across the railroad.

The findings of the District Judge.

It will be noted that the form of these phrases was evasive and suggested a confession and attempted avoidance, rather than a direct issue; and as the evidence showed (*infra*, p. 158), this is all the answer amounted to.

The papers submitted to sustain the contentions of the parties were voluminous. As to the controverted matter, by his opinion (*supra*, p. 72; record, p. 133) the District Judge found

that the provisions for forfeiture did not contemplate the forfeiture of the whole;

that the order to perform was impossible of performance;

that the City was not in a position to demand literal fulfilment;

that the streets and grades were so far advanced that the parties by working together could complete the contract,

“yet the City is not in a position where it can insist that the road must at its peril perform literally all the parts of the agreement” (p. 133).

In other words, the District Judge, after considering the evidence before him, in the shape of affidavits and documents, concluded that the City had not in fact complied with the conditions of the franchise and was not in such a situation in fact, that as a matter of law it could rightfully claim a forfeiture. In short, he did not exert the power of equity to prevent a forfeiture legally incurred, but he held that, *as matter of law*, no forfeiture had been or could be incurred by reason of the facts. His order (p. 125) recited the opinion of the Court as filed. It is therefore properly to be construed in view thereof.

The contemplated resolution of the Board, representing the City, provides (p. 37) that the railway constructed and in use shall become the property of the City of New York “without proceedings at law or in equity.”

The question is thus squarely presented whether the City of New York is empowered to forfeit such property.

The reasoning of the Circuit Court of Appeals.

The Circuit Court of Appeals (266 Fed. R. 627, at pp. 634-641; Transcript of record, pp. 137-150) reached its conclusions along the following line of argument:

that the condition now insisted on had been inserted in the contract pursuant to the requirement of the City Charter, which was a law of the State (opinion, Record, p. 143; 266 Fed. R., p. 634);

that the State law as construed by its highest court empowered a municipal corporation to grant a conditional consent (266 Fed. R., p. 634; opinion, Record, p. 144);

that the exercise of the power both to grant and revoke had been transferred by the City Charter to the Board which threatened to act;

that in so acting the Board would be exercising legislative power (266 Fed. R., p. 635; opinion, Record, p. 144);

that in revoking a franchise it would act in a governmental capacity;

that a court of equity will not restrain the exercise of such power, though unconstitutional;

that there is no distinction between the right to enjoin a legislature and a municipal corporation in the exercise of such power (266 Fed. R., p. 636; opinion, Record, p. 145);

that there is no substantial distinction between the exercise of such power by ordinance and by resolution;

that the grant of a franchise is a legislative act;

that authorities are disagreed whether the forfeiture of a franchise is necessarily a judicial function;

that the company did not comply with its contract; and because it did not do so its franchise automatically ceased and determined;

that the reasons put forth afford no excuse; and impossibility of performance is no legal excuse (266 Fed. R., p. 637; opinion, Record, p. 146);

that the proposed resolution forfeits

(a) the franchise;

(b) the property;

that the fixing of the terms and conditions of the grant and forfeiture are a legislative act; and that the Board acts legislatively in so doing;

that upon accepting the grant the grantee is estopped to test the validity of its conditions;

that here the grant and forfeiture grow out of the exercise of legislative power and of contractual obligation;

that it makes no difference that the franchise was forfeited automatically, and the railway by the resolution;

that the meaning of "railway" is not determined (266 Fed. R., p. 638; opinion, Record, p. 147);

that the objections of the Receivers based upon the poles and similar structures or trees are not impressive (266 Fed. R., p. 639; opinion, Record, p. 148);

that the physical conditions and legal situation of title, regulating and grading did not amount to what was contended in behalf of the Receivers and were not of such character as to deprive the City of the right to enforce the condition;

that the whole franchise was forfeited according to its terms by a failure to complete an extension when directed (266 Fed. R., p. 640; opinion, Record, p. 149); that such was its plain intent;

that the forfeiture was incurred prior to the appointment of the Receivers (266 Fed. R., p. 640; opinion, Record, p. 149);

that the forfeiture was imposed under and by virtue of statutory legislation, and the Court is without power to grant relief;

that the Receivers have not made out a case

(a) of compliance, or

(b) of legal excuse, or

(c) for relief from forfeiture

(266 Fed. R., 641; opinion, record, p. 150).

Our position.

While we have analyzed the whole opinion of the Circuit Court of Appeals, it is only necessary for us to establish

1. that the Court of Appeals was without jurisdiction (*supra*, Point I, pp. 27-44); or

2. that the contract does not mean what that Court construed it to mean;

3. that in passing the resolution of forfeiture the Board would not be acting legislatively, but would be asserting and enforcing a contract right without judicial sanction;

4. that the Receivers and their predecessors in interest had legal excuse for non-compliance;

5. that equity should relieve;

We now proceed to demonstrate that our position upon each of these additional propositions 2, 3, 4 and 5 is sound.

A.

The Franchise contract does not mean what the Court of Appeals construed it to mean; its proper construction was that adopted by the District Judge.

It should be given effect in accordance with the intent of the parties at the time it was made, but with due regard to a reasonable construction and without according to one of the parties purely arbitrary power unless its terms very plainly so import. It should likewise be construed, if it admits of such construction, to have been designed in reasonable fairness.

Neither the District Judge nor the Court of Appeals in their respective opinions (pp. 133, 137) analyzed the franchise contracts. What the District Judge found it "impossible to hold," the Court of Appeals settled (p. 146) by the quotation of a single phrase and an *ex cathedra* opinion thereon. In view of this irreconcilable conflict, we shall carefully and at length analyze the contracts.

And we shall show (*infra*, p. 85 *et seq.*) that there were several different and mutually exclusive forfeiture clauses, only one of which (if any) is applicable, and that this clause is not the one relied on by the City as the basis of its power and right. We shall further show (*infra*, p. 89) that the only applicable clause (if applicable) did not provide for the forfeiture of the completed part of the railway, but only, at most, of the uncompleted section or a part of it.

The Franchise Contracts.

While we have above (*supra*, p. 10) set out the *proviso* upon which the appellants contend

(*supra*, pp. 48-71) that the City failed to comply with a condition precedent to any requirement of the extension, we shall now proceed to the analysis of the franchise contracts in greater detail, in order to show that it is "impossible to hold" with the City.

The basis of the rights of the Traction Company, which devolved upon the Receivers for the purposes of possession and operation according to the order of their appointment (Transcript, p. 76) and the order continuing them (Transcript, p. 78), lay in three contracts (*not* in three laws), dated respectively October 29, 1912 (p. 37), July 21, 1913 (p. 62), January 21, 1916 (p. 67).

The Receivers were receivers in possession and enjoyment of *franchises* as well as of tangible property (pp. 76, 79), and the recited purpose of their appointment was (p. 76)

"so that the operation of the railway system of the defendant shall be continued, and the public duties obligatory upon the defendant in that respect be in all respects be discharged and to exercise the authority and franchises, easements, rights and privileges of the defendant, and to preserve and protect its said system in proper condition and repair and to protect the title and possession thereof * * *"

They were therefore far more than receivers of specific pieces of tangible property and were entitled in behalf of the Traction Company and its creditors to the judicial protection of the property in franchises as well as visible and tangible property.

We shall show below that the forfeiture clause applicable is to be understood only by a careful study of the initial contract of October 29, 1912 (*infra*, pp. 87-103) and the modifying contract of January 21, 1916 (*infra*, p. 104).

The Initial Contract of October 29, 1912.

The CONTRACTS, three in number, began with the contract of October 29, 1912, between the City of New York and South Shore Traction Company (pp. 37-57). It was entered into by the City under its corporate seal (p. 57), and by the South Shore Traction Company and its Receivers (p. 58), pursuant to an order of the United States District Court dated July 11, 1912, in an action then pending therein, which provided (pp. 60-61) that the Receivers of the South Shore Traction Company, might execute a *contract* with the City

“for the *right* and *privilege* to construct, maintain and operate said surface railroad with the necessary wires and equipment for the purpose of doing a general street railroad business in the Boroughs of Manhattan and Queens, in the City of New York, upon the route described in the proposed contract.”

It was further ordered (p. 61) that “said contract or franchise with the City of New York,” should be assigned to the Manhattan and Jamaica Railroad Company, but the assignment was subsequently made to the present Traction Company. It is obvious, that no matter what the *power* under which the City acted, the United States Court was authorizing its Receivers to enter into a *contract*, and was not participating in legislation.

The agreement stated (p. 37) that it was a *contract*. It is to be interpreted as are other contracts and by the same rules of construction; and the intent to be discovered is the intent of both parties as manifested in the instrument.

It cancelled certain pre-existing agreements between the same parties and substituted

“the grant herein contained with the conditions thereof” (p. 38).

The "Grant" Covers Two Distinct Franchises.

By its terms the City grants (p. 38)

"the following rights and privileges"

then follows:

"*First* (p. 38), to construct, maintain and operate a street surface railway upon the following *routes*, which are specifically described from 'the Beginning * * * to a point where Central Avenue intersects the boundary line between the City of New York and the County of Nassau' (pp. 38-39). [The right now in dispute falls within this category, but is only a part of it.]

Second (p. 40) to operate the cars upon Queensboro Bridge and approaches, as described."

These two grants are treated in the *contract* severally, the one by section 3 (pp. 40-47), the other by section 4 (pp. 47-49); and collectively by section 5 (pp. 49-57).

In various respects the rights and privileges granted are treated as severable, for the first only is conditioned upon certain consents (p. 41) which are not required in respect to the second. The life of the first franchise is to be 25 years with renewal upon revaluation (sec. 3. Paragraph SECOND, p. 41); the life of the second franchise was to be for a different term (sec. 4, Paragraph FIRST, p. 47). The provision for cessation upon non-compliance was in Section 3, and therefore related (whatever its scope), to the first franchise only; while section 5 expressly covers both franchises (pp. 49-57); and section 6 conditions "this grant" upon compliance with the provisions of the Railroad law.

It is obvious therefore that the forfeiture provision now under consideration did not apply to the

entire grant. But even within the scope of a single class it appears that the *rights granted* were sometimes considered and referred to collectively, *e. g.* (p. 41), the provisions for renewal and revaluation and for termination, (but *not* for forfeiture, *infra*, pp. 89-107), and sometimes severably.

The contract in section 3 (pp. 38-47), (and therefore as a condition subsequent—p. 41—which it applied only to the franchises embraced under the "First" element of the grant, *supra*, p. 88) provided that upon "the termination of this original contract", or the termination of the renewal term,

"or upon the termination of the *rights* hereby granted for any cause" (p. 42),

or the dissolution of the company,

"the tracks and equipments of the Company, *constructed* pursuant to this contract within the streets and avenues shall become the property of the City without cost",

though provision was made (p. 42) for removal and restoration if required by resolution of the Board, of the City.

The Only Applicable Forfeiture Clause.

This *forfeiture* clause is a part of Paragraph SEVENTH (pp. 44-45) of Sec. 3 (pp. 40-47), which not only dealt with the first described franchise alone, but even divided it into four portions, which it treated severally.

The Contract in section 3 (pp. 40-47) specifying according to its terms (p. 41) the conditions applicable to the "First" element of its grant (p. 44), provided in its Paragraph "Seventh" for completion of construction and operation in *four*

sections during *four* periods; one section on or before Oct. 31, 1912; a second section on or before December 31, 1912; a third section on or before March 31, 1913; the *fourth* section within six months after notification of willingness of the President of the Borough to issue a permit for construction on the streets involved; and then, continuing in the same paragraph (p. 44), as qualifying its terms only, it proceeded:

“Upon the failure of the Company to complete the construction and place in operation *any of the said portions* of the railway on or before the dates or times herein specified, *the right herein granted* shall cease and determine.”

The first question which arises is whether, properly construed, the “right *herein granted*” in this connection means the entire franchise to operate the completed portions, or only the right to complete and operate the uncompleted portion.

We contend that in view of the fact that the authority to exercise the right was severable into four portions, limited by different dates and attended as to the *fourth* portion only (now under consideration) *with a prior permit to be granted in the future, as a condition precedent*, the provision for forfeiture was disjunctive, and applied only to the uncompleted portion.

It is noteworthy that in the THIRD paragraph of section 3 of the agreement (p. 42) it is upon the *termination* of the “rights hereby granted” (that is all of them) that the tracks and equipment shall become the property of the City, whereas in this provision for forfeiture (SEVENTH, pp. 44, 45) it is only “*the right herein granted*” which shall cease and determine (pp. 44-45); as *four* rights are mentioned in this paragraph and

they are to be enjoyed for different periods, and the penalty is to be exacted with respect to "*any* of said portions", it is more reasonable to consider and is fairer, that the forfeiture is to be exacted only with respect to the uncompleted portion, and that the distinction between *rights* in paragraph Third (p. 40) and *right* in paragraph Seventh (p. 44) was advisedly made.

This was Judge Chatfield's opinion (p. 133), though he did not point out his reason. He said:

"By the terms of the franchise 'the right herein granted' ceased upon failure 'to complete and place in operation' any of the portions of said railway by the date specified. It is *impossible* to hold that this meant forfeiture of the parts and equipment of the railroad completed and in use under separable portions of the contract and also forfeiture of the whole franchise because another separable part or extension was not completed on time."

We submit that the draughtsman and the parties distinguished the *termination* of the *rights* granted *by* the entire contract, from the cessation and determination of the *right herein* granted; in the one case meaning one only, in the other all. They made the same distinction in section 3 (p. 40) when they conditioned a specific *right* (the "First" element of the grant, *supra*, p. 88) and not all of the *rights*, upon a certain consent; and when they limited the *right* to construct, maintain and operate said railway to 25 years.

It is this "First" right which was to last 25 years (p. 41), the *right* which considered alone is the subject of section 3 (pp. 40-41); this term did not by relation refer also to the "Second" right to operate bridge cars (sec. 2, Second, p. 40), which

has its own different period of life (sec. 4, p. 47). The distinction is therefore clearly enough made between the termination of the *rights* (sec. 3, Third, p. 42), and the cessation of the *right* (sec. 3, Seventh, pp. 44, 45). As this is a provision for forfeiture it should be most strictly construed against rather than in favor of the forfeiture.

Other distinctions between the collective rights and the disjunctive right appear elsewhere; for instance, in Paragraph FOURTEENTH (p. 47) of section 3 it is the right hereby granted to operate a street surface railway (the operation over the Bridge is not literally a street surface railway); in Paragraph FIFTEENTH, (p. 47) it is the *right* to have railway tracks on private property, which is not to be compensated by the City, if the private property is thereafter acquired by the City, while it is "the *rights* hereby granted" in the streets and avenues which are to be extended in that event.

In short, section 3 deals in its entirety with one only of two distinct grants, and in its various parts (Paragraphs First to Sixteenth, pp. 40-47) deals both with the "rights" collectively, and with the "right" distributively, embraced within the first described franchise in the grant. It does not deal at all with the "Second" described franchise in the grant; this is dealt with in sec. 4 (p. 47, *et seq.*).

So that, in any event the provisions for cessation and termination in sec. 3, Paragraph THIRD and Paragraph SEVENTH were never intended to extend to the entire grant or all of its rights; they were confined in their broadest reach to the "First" franchise (*supra*, p. 88). But even within this compass, the draughtsman distinguished between the "*rights* hereby granted" collectively and "the *right* herein granted" distributively.

The various forfeiture clauses in section 5 do not apply to the present situation.

Only when *section 5* of the contract is reached, does the agreement deal conjunctively with the conditions which it attaches to the two different franchises (FIRST and SECOND above, p. 88).

And these conditions do not expressly concern forfeiture except by Paragraphs FOURTH, THIRTEENTH and SEVENTEENTH. Of these, Paragraph "FOURTH" applies specifically to the *manner* of construction and operation and to equipment and appurtenances, and not to completion of construction.

Paragraph "THIRTEENTH" (p. 54) (under which the City intended to act by its Resolution, p. 35) applies *only* to the breach of conditions attached by section 5, and *not* to the conditions attached by section 3. It will be discussed more fully below (p. 96). Paragraph "SEVENTEENTH" (p. 56) applies solely to the forfeiture of a deposit to the City in event of the breach of certain conditions.

It is noteworthy therefore that the contract contains five express provisions for forfeiture (sec. 3, Paragraphs Third, Seventh; sec. 5, Paragraphs Fourth, Thirteenth, Seventeenth), one with respect to the forfeiture of the *contract*, one with respect to the rights in the "First" element of the grant, the street *surface* railway (sec. 3, par. Seventh, p. 44), one with respect to the rights in both the "First" and "Second" elements of the grant, but only as to *manner*, equipment and appurtenances (sec. 5, p. 49, Paragraph Fourth, p. 51), one with respect to "*any* violation or breach or failure to comply with any of the provisions *herein* contained" (which being in section 5, should be construed to be limited to a breach of any provision of section 5); and no provision of section 5, requires the extension of the railroad over the

fourth portion of its route (now under consideration) (sec. 5, Paragraph Thirteenth, p. 54); and the final one, in respect to the forfeiture of the residue of a deposit by the Company with the City to secure the construction of the respective *portions* of the railway (sec. 5, Paragraph Seventeenth, p. 56).

There is a final "condition," not expressly mentioning forfeiture, which by section 6 (p. 57) (compliance with the Railroad law), is attached to "this grant" (i. e., both the "First" and "Second" elements) and finally there is a covenant by the Company

"to conform to and abide by and perform all the terms, conditions, and requirements in this contract fixed and contained."

A Survey of the Forfeiture Clauses.

In this survey the facts which challenge attention are that by section 3 (pp. 40-47) *conditions* are attached to the "First" element of the grant, (*supra*, p. 88) by section 4, (pp. 47-49) *conditions* are attached to the "Second" element of the grant (*supra*, p. 88), by section 5, (pp. 49-57) *conditions* are attached to both the "First" and "Second" of said elements, and that by section 6, (p. 57) *conditions* are attached to "the grant"; while there are five express provisions for forfeiture (*supra*, p. 93), the first on terms mentioning the forfeiture of the *contract*, the second a condition only of the First element of the grant (sec. 3, Paragraph Seventh, p. 44) applying to "the right herein granted," (there being four successive rights granted, one of which is expressly postponed in enjoyment till the further action of the Borough President—p. 44); the third, (sec. 5, Paragraph Fourth, p. 51) for a dif-

ferent cause, applying to both the "First" and "Second" element of the grant, but limited however to *manner* of construction and operation, and to equipment and appurtenances; the fourth (sec. 5, Paragraph Thirteenth, p. 54), being found in the section which attaches conditions to both the "First" and "Second" elements of the grant, but which limits the forfeiture to violations of "any of the provisions *herein* contained" (p. 54); and the fifth being also found in the same section (sec. 5, Paragraph Seventeenth, pp. 55, 56), but applying only to the forfeiture of a residue of a specific deposit which is returnable in instalments to the Company meanwhile, on completion successively of two portions, together constituting the entire length of the whole railway to be embraced in the "First" and "Second" elements of the grant.

When so considered it is at once apparent that it was not contemplated by the draughtsman or the parties that a single forfeiture provision should cover all contingencies, else the others would then be surplusage; they are certainly not duplications; if the forfeiture clause in Paragraph THIRTEENTH of sec. 5 (p. 54) (under which alone the City now claims to act—Resolution, Transcript, p. 37) was intended to operate automatically upon the entire grant on Resolution of the Board at its option, it was wholly unnecessary to provide with respect to the construction of the three portions collectively of the "First" element of the grant, that they collectively should cease and determine *ipso facto*, when the failure to comply would also give the Board (under sec. 5, Paragraph THIRTEENTH, p. 54) the option to resolve upon a forfeiture, or the Corporation Counsel the option to forfeit by suit. If the forfeiture of the whole of the "First" ele-

ment took place automatically, it would be wholly unnecessary to provide with respect to both (sec. 5, p. 49) the "First" and "Second" elements that an option might be exercised as preliminary to such forfeiture. Any such interpretation would result in the construction that the option reserved as to the whole, applied only to the railway on the Queensboro Bridge and its approaches, the "Second" element of the grant, for, by the terms of Paragraph SEVENTH, of sec. 3 (pp. 44-45), as construed by the Circuit Court of Appeals, the entire *First* element, the railway, except upon the Bridge and its approaches, would already have been forfeited *ipso facto* and there would be no necessity or reason for reserving the option.

No, Paragraph THIRTEENTH (p. 54) of section 5, related to both of the elements of the grant, "First" and "Second," by the very terms of the opening sentence (p. 49) of section 5, but it was limited in its operation to the breach of the specific conditions imposed by section 5, and these specific conditions did not relate to the requirements of section 3, respecting the completion of the *fourth* "portion" (*supra*, pp. 89-90) of the street surface railway (p. 38), which together with the *first, second and third* "portions" of such railway, constituted the "First" element of the grant. These *specific conditions* were (1) payment (p. 49), (2) duration (p. 51), (3) terms of assignment (p. 51), (4) manner of construction and operation, equipment and appurtenances (p. 51), (5) rates of fare (p. 52), (6) character of cars, express rates (p. 52), (7) lighting (p. 52), (8) headway and hours (p. 52), (9) safety appliances (p. 52), (10) heat (p. 52), (11) reports (p. 53), (12) book-keeping (p. 53), (13) forfeiture for breach "of the provisions *herein* contained" (p. 54), (14) penalty and remedy for inefficient ser-

vice (p. 54), (15) assumption of liability (p. 54), (16) deposit of security for continuous performance (p. 54), (17) deposit of security for specific construction (p. 55), (18) past forfeiture (p. 57), (19), (20) definitions (p. 57), (21) devolution of powers of City authorities (p. 57).

Not one of these "provisions" concerned actual construction, which was covered, with its own provision for forfeiture, exclusively by Paragraph SEVENTH (p. 44) of section 3.

Therefore, the provision for forfeiture in Paragraph "THIRTEENTH" (p. 54) of sec. 5 (under which alone the City claims to act—Resolution, Transcript, p. 37) did not concern failure to construct the *fourth* "portion" of the "street surface railway" mentioned specifically and provided for, both as to construction and forfeiture by Paragraph SEVENTH of section 3. And consequently, it was necessary, if there was to be any provision for such forfeiture, that it should be independently inserted; and it was; so that we do find, very logically, two provisions for forfeiture applicable to the failure to construct such portion, the one, for the forfeiture of the right granted (sec. 3, Paragraph SEVENTH, p. 44); the other, for the forfeiture of the deposit to secure construction (sec. 5, Paragraph SEVENTEENTH, pp. 55, 56).

But it is also noteworthy that it is not the whole deposit which was to be forfeited, but only a residue (p. 56); so that here, too, there is a correlation, between the provision for the forfeiture of the right granted in Paragraph SEVENTH of section 3 (p. 44), and the forfeiture of the balance of the deposit (Paragraph SEVENTEENTH, sec. 5, p. 56). When a portion of the road was completed including both the Bridge portion (element SECOND of the grant, *supra*, p. 88) and the

first, second and third "portions" of its street surface railway (sec. 3, Paragraph SEVENTH, p. 44; sec. 5, Paragraph SEVENTEENTH, p. 56), then the Company was to have returned to it \$15,000 of its deposit (p. 56), but not more; when it completed the *fourth* "portion" (now under consideration) it was to have the remaining \$15,000 returned to it; if it failed to furnish proper certificates of construction it was to forfeit only such portion of the \$30,000 deposit as had not already been returned to it. In other words, under the provisions for deposit and its forfeiture, there was to be no forfeiture of the first \$15,000 if the railway was properly completed, except the *fourth* and last "portion"; and in case then the *fourth* "portion" only remained uncompleted, only the remaining \$15,000 was to be forfeited.

This correlative clause in Paragraph SEVENTEENTH of section 5 (p. 56) throws light upon the earlier forfeiture clause in Paragraph SEVENTH of section 3 (p. 44); under the latter the railway was to be completed in four "portions"; under the former its deposit was to be returned to it in "portions"; and, construed in harmony with this scheme, the forfeiture provision of Paragraph SEVENTH of sec. 3 (p. 44) should have provided only for forfeiture of uncompleted portions; and as construed by Judge Chatfield it did so provide. His view (Transcript, p. 133) was that it was *impossible* to hold otherwise. We contend that it is impossible to hold otherwise; so construed it is less drastic, it is mutual, it is reasonable, it is logical in its parts and the forfeiture of franchise and forfeiture of deposit divide along the same line of cleavage as to the *fourth* "portion" of the street surface railway, which was peculiarly conditioned as the other two portions were not. It would be mutual, because it would forfeit only

that part, which the City, by the withholding of the permit could prevent from completion at the will of the President of the Borough (p. 44); whereas under any other interpretation the Traction Company, though indefinitely prevented from proceeding as to the *fourth* "portion", might suddenly be called on to forfeit the completed parts of its road, though it had promptly completed them and complied with every condition concerning them and had satisfied the City therewith and withdrawn the deposit to secure such construction.

While it might be possible to provide for such forfeiture, it should be provided in no unmistakable terms; and according to any reasonable and fair construction, which ought to be imputed to the parties, such provision should not arise from the words

"the right *herein* granted shall cease and determine" (pp. 44, 45)

when the entire grant was not in section 3, nor its Paragraph SEVENTH, but in a preceding section 2, and when the very same Paragraph SEVENTH provides for the construction of the railway in four sections; and the very same clause, which inaugurates the forfeiture is in the words (p. 44):

"Upon the failure of the Company to complete the construction and place in operation *any* of the said *portions* of the railway on or before the dates or times herein specified"

The portions, the dates, the times, are severally and distributively treated, the forfeiture, though couched in the words "the right *herein* granted shall cease and determine," should likewise be held to apply severally and distributively to the uncompleted portion, and not to the portion completed, as to which the City had been fully satisfied.

The rule of construction, "*reddendo singula singulis*" was applied in *People vs. Broadway Railroad Co.*, 126 N. Y. 29, 42, to interpret a clause respecting the completion of a railroad, as soon as streets and avenues shall have been opened, graded and paved, as applying distributively, so as to require construction progressively as opened, graded and paved. Paragraph SEVENTH of section 3 of the Contract now in controversy, itself provided for progressive construction within stipulated times for stipulated sections; but the maxim above quoted should be applied with equal force to a clause which grants rights for progressive construction in four sections, and which, for failure to complete the respective sections, provides for the forfeiture of "the right herein granted."

This construction is not only reasonable, logical and consistent and fair, but it comports with the legislative scheme embodied in the Railroad law with which the contract was by its own express terms to comply (sec. 6, Transcript, p. 57). The Railroad Law provides and, since 1910, has provided as follows:

"In case any *street surface railroad* corporation shall not commence the construction of its road, or of any *extension or branch* thereof, within one year after the consent of the local authorities and property owners or the determination of the Appellate Division of the Supreme Court as herein required, shall have been given or renewed, and shall not *complete* the same within three years after such consents or determination shall have been obtained, its rights, privileges and franchises in respect of such railroad or *extension or branch*, as the case may be, *may be forfeited*. If the performance of any act required by this chapter or any prior acts within the times herein prescribed is hindered, delayed or prevented by legal proceeding in any

court, such court may also extend such time for such period as the court shall deem proper or if the performance of any act required by said statutes within the times therein prescribed is hindered, delayed or prevented by works of public improvement, or from any other or different cause, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hindrance, delay or prevention." (Section 179 of the New York Railroad Law, L. 1910, Ch. 481.)

Section 45 of the Greater New York Charter provides:

"Nothing in this act contained shall * * * repeal or affect the existing general laws of the state in respect to street surface railroads."

By Section 6 of the franchise it is specifically provided that the grant is upon the condition that the provisions of the Railroad Law shall be complied with (Transcript, p. 57).

That the State legislature itself could not itself have revoked the franchise unless the condition precedent had been performed by the City and had thus given rise to the right of forfeiture in conformity with the terms of the contract is established by a long line of decisions, of which the following are examples:

Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518.

Fletcher v. Peck, 6 Cranch, 87.

State of New Jersey v. Wilson, 7 Cranch, 164.

Chenango Bridge Co. v. Binghamton Bridge Co., 3 Wall, 51.

West River Bridge Co. v. Dix, 6 How. 507.
Piqua Branch Bank v. Knaap, 16 How.

369.

Farmington v. Tennessee, 95 U. S. 679.

Humphrey v. Peques, 16 Wall, 247.

Wilmington & W. R. R. v. Reid, 13 Wall, 264.

Davis v. Gray, 16 Wall, 203.

Hall v. Wisconsin, 103 U. S. 5.

New Orleans Water Works Co. v. Rivers, 115 U. S. 674.

New Orleans Gas Light Co. v. Louisiana

Light & Mfg. Co., 115 U. S. 650.

People v. Squire, 145 U. S. 175.

That a street railway franchise in streets is property in New York which cannot be taken away by legislative act without compensation is established by the leading case of

People v. O'Brien, 111 N. Y. 1.

And the tracks of a railroad company and the franchise of maintaining and operating its railway in a public street are inseparable in the absence of express legislative authority providing for their severance.

Ibid.

cf. Gue v. Tidewater Canal Co., 24 How. 257.

The distinction, therefore, made by the Circuit Court of Appeals between the *franchise* to run, and the interference with *tangible* and *visible* property in the possession of the receivers was unjustifiable.

Indeed, it is at least questionable, in view of the language of the Court of Appeals of New York in

People v. O'Brien, 111 N. Y. at pp. 49-51, whether as against the creditors of the Traction Company, whose rights are represented by its Receivers, the unrestricted right to revoke the franchise and forfeit the property at the will of one of the parties to the contract, the City, would not be void, as a right beyond the power of the parties to the contract to create, in view of its nature.

But, be this as it may, it is not necessary here to rely upon that proposition, because the condition precedent for the revocation of the franchise had not been fulfilled (*infra*, p. 146 *et seq.*).

There is, however, abundant authority in decisions of this Court, cited with approval in *People v. O'Brien*, 111 N. Y. at pp. 49-50, as the law of New York, to the effect that a reserved power to legislate respecting a corporation or its powers cannot be used to take away property already acquired or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. Mr. Justice Bradley of this Court (dissenting opinion, Sinking Fund Cases, 99 U. S. 700, 749) is quoted with apparent approval as follows (*ibid*, p. 50):

“A reservation of power to violate a contract or alter it, or impair its obligation would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract is not sustainable.”

The Contract of July 21, 1913 (pp. 62-65).

This contract does not modify the forfeiture clauses which we have discussed. It is made be-

tween the City and the present Traction Company, recites the City's consent to the assignment of the above described contract of October 29, 1912, to the present traction company, changes certain portions of the route and provides that otherwise the former contract shall remain unchanged.

The Contract of January 21, 1916 (pp. 67-72), inserting a new proviso (supra, p. 10), as a condition precedent to the City's right to require completion and to declare a forfeiture.

This Contract (which considerably modifies Paragraph SEVENTH, of section 3, of the former contract, the Paragraph containing the only applicable forfeiture clause,) is between the City and the present Traction Company; it recites certain extensions of time for the completion of "portions" of said railway, and amends PARAGRAPHS SEVENTH and EIGHTH of section 3, of the contract of October 29, 1912. It strikes out the former provisions of Paragraph SEVENTH in relation to the completion of the *fourth* "portion" of said street surface railway, and substitutes a provision for completing it in two subdivisions (thus making a *fourth* and a *fifth* "portion") one before a specified date, the other after August 1, 1916, as directed by the Board. It also, however, inserted a *new clause* (p. 70) respecting the completion of said final subdivision:

"Provided that title to the streets involved has been vested in the City and that said streets have been regulated and graded."

It will thus be seen that the proviso respecting vesting of title in the City and regulation and grading was an important clause, now imported as a new clause to mitigate the obligations of the

Traction Company. The contract of modification in respect to date of completion recited (in January, 1916) that the limits of time in respect to the completion of the first three portions had been extended as to the second of them to be completed to January 31, 1914 (then past), and it modified Paragraph SEVENTH so as to include this date; but as to the *fourth* "portion" in the former contract, it split it into two subdivisions (thus making a *fourth* and a *fifth* "portion") one to be completed on or before May 1, 1916; the other (now under consideration), within such time *or* times (i. e., distributive) as may be directed by resolution of the Board on the recommendation of the Borough President,

"provided that title, &c," . . . as above (p. 104).

The forfeiture clause in Paragraph SEVENTH remained unchanged in verbiage; but this does not mean that the effect necessarily remained unchanged, because this contract, which modified the former contract, treated its own privileges as themselves a *new* grant, and attached conditions to this new grant (see sec. 2, *infra*).

So that, whatever might have been the meaning or intent of the original grant and its forfeiture clause, the parties expressly treated this new privilege as a new and distinct grant; not only was the original language of the forfeiture clause continued, though the preceding language of the same Paragraph SEVENTH (p. 70) to which it formerly applied had been changed; but section 2 of the agreement of modification expressly provided (p. 71):

"Section 2. The grant of this privilege is subject to the following *conditions*":

that all other terms, provisions and con-

ditions should remain unchanged and in full force and effect.

But this did not enlarge any of them.

We submit, therefore, that by the terms of the contract of modification, the other parts of the railroad having already been completed and the time for such completion having expired almost two years previously, and the new subdivision of the *fourth* "portion" (into a *fourth* "portion" and a *fifth* "portion") of the street surface railway having been expressly treated as "the grant of this privilege" it is an indication not only that the parties intended and understood that the old privileges were not to be forfeited, for the failure to comply with the new privilege, but also that the new privilege alone now was subject to forfeiture for failure to complete the respective subdivisions of the former *fourth* "portion."

Paragraph Eighth of section 2 of the former contract was also modified by this last mentioned contract of modification, but we do not need to discuss it in this connection.

We therefore maintain that we have demonstrated by this analysis of the parts of the contract and the history of its modification, that

1. the only forfeiture clause applicable to the present situation, is that contained in the SEVENTH paragraph of section 3, as set forth *verbatim* in the contract of January 21, 1916 (pp. 70-71).

2. this clause never did contemplate that for failure to comply with the demands of the Board to complete the construction of the last subdivision or either of the two subdivisions of the former *fourth* "portion" of the street surface railway, the entire grant, or the entire street surface railway should be forfeited, or the entire contract terminated, or the tracks and equipment vested in the City;

3. Whatever right to demand completion of this subdivision the City had was dependent upon the condition precedent that title to the streets involved had vested in the City and said streets had been regulated and graded.

We maintain therefore that the contemplated resolution of the Board and action of the City was wholly without warrant in the contract, for it contemplated forfeiture of the entire contract and the confiscation of the railway without proceedings at law or in equity, (proposed resolution, p. 37), and was to be passed under the authority claimed to be reserved in Paragraph THIRTEENTH of section 5 of the original contract of October 29, 1912 (p. 35), which we have shown (*supra*, p. 96) has no application to the present case, but only to the breach of the specific conditions enumerated above (p. 96).

The Circuit Court of Appeals erred in holding that the franchise was forfeited automatically on August 23rd, 1917.

This conclusion necessarily follows from the foregoing analysis of the various forfeiture clauses themselves (*supra*, pp. 94-107).

The Board of Estimate and Apportionment of the appellee, on February 16, 1917, by resolution, directed the Traction Corporation to make the extension of its road in question within six months from the date of the approval of the resolution by the Mayor. The Mayor approved the resolution on February 23, 1917, thereby making August 23, 1917, the date within which the completion of the extension in question was required by said resolution.

For convenience we repeat here the specific franchise provision as to when the Traction Cor-

puration was to construct and put in operation the different sections of its road (Section 3, subdivision Seventh of the amendment of January 21, 1916, set forth in full on pages 9, 10 of this brief *supra*). After stating the time within which each section of the road is to be completed, said subdivision provides for failure to complete, as follows:

“Upon the failure of the Company to complete the construction and place in operation any of the said portions of the railway on or before the dates or times herein specified, the *right herein granted* shall cease and determine, and all sums or securities paid to the City, or deposited with the Comptroller as security for performance by the Company of the terms and conditions of this contract, as herein provided, shall be forfeited to the City without action by the City, *provided, however*, that the Board may extend the time within which to complete the construction and place the railway in operation as it may deem just and equitable.” (Transcript, p. 71.)

The Circuit Court of Appeals having found (contrary to the record, as appellants contend) as a fact that the appellee had, by February 16, 1917, vested title and regulated and graded to their full width and length all the streets involved, concludes that as a matter of law “the franchise was forfeited automatically by the failure to complete the trolley line within the period prescribed.” (Transcript, p. 147.)

This holding is not only contrary to law and the authorities, but quite overlooks the fact, affirmatively established by the record, that the appellee, by its acts, waived, if there were one, the forfeiture.

(a) *Conditions subsequent in a grant are not self-executing.*

The right to the franchise grant had already vested in the Traction Corporation. It had constructed the greater portion of its road by virtue thereof, and was in possession of the road and the franchise. Assuming then, for the sake of argument, that there had been a failure by the Traction Corporation to comply with one of the conditions of the franchise, it was a failure to perform a condition subsequent. The language of the condition in the franchise and of the forfeiture clause is similar to that employed to terminate leases or estates for failure to perform. The mere failure to perform a condition subsequent in a lease, deed or grant, does not *ipso facto* divest the estate.

In *Schulenberg v. Harriman*, 21 Wall., 44, 63, the Court states, in part, as follows:

“And it is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down.”

In *Nicoll v. The New York and Erie Railroad Co.*, 12 N. Y. 121, 130, the Court states as follows:

“The Hudson and Delaware Railroad Company then, by their grant from Dederer, took title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condi-

tion precedent, as was argued by the plaintiff's counsel, but a condition subsequent. The fee vested at once, subject to being divested on a failure to perform the condition. This is apparent from the language employed in the grant and from the character of the transaction. There are no technical words by which to distinguish between conditions precedent and subsequent. Whether a condition be one or the other is matter of construction, and depends upon the intention of the party creating the estate. (4 *Kent*, 124; 1 *Term R.*, 645; 2 *Bos. & Pull.*, 295; 3 *Peters' U. S. R.*, 346.) In the latter case, Marshall, Ch. J., said: 'If the act (on which the estate depends) does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole instrument, the condition is subsequent.' In this case, it was evidently the design of the parties that the estate should vest at once, so that the grantee might proceed immediately with the construction of the road; otherwise a condition that it should be completed within a given time, or ever completed, would be impossible. From the character of the condition, it could not be a condition precedent. Possession and control of the land must necessarily accompany the construction and precede the completion of the road. The grant is not made to take effect on the happening of a certain event, but *in presenti*, and liable to be divested by the grantee's failure to perform the condition. (See also 5 *Ham. Ohio Rep.*, 389; 9 *East R.*, 170; 5 *Pick. R.*, 528; 18 *Martin's Louis. R.*, 221; *Co. Litt.*, 246 b.) Kent says (4 *Kent*, 129): '*Conditions subsequent are not favored in the law and are construed strictly, because they tend to destroy estates.*' They can only be reserved for the benefit of the grantor and his heirs, and no others can take advantage of a breach of them. (4 *Kent Com.*, 122, 127; 2 *Black. Com.*, 154.)

"A mere failure to perform a condition

subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate."

In the case of *Hagerla v. Mississippi River Power Company*, 202 Fed., 776, it was held that conditions subsequent in a grant from the State are never self-forfeiting.

The case of *Foster v. The City of Joliet*, 27 Fed., 899, involved a contract between a municipal corporation and a water company, for the construction and operation of a water-works. The contract provided as follows:

"In consideration of this undertaking on the part of Starr the city agreed to give the water company exclusive rights in its streets for 30 years for water purposes, with the proviso that, in case of failure to construct or maintain such water-works, *the rights and franchises granted should cease and determine*; * * *. It was further agreed that Starr should commence work within 60 days from the date of the contract, and complete the same within one year after such 60 days."

The City Council adopted a resolution declaring that all of the rights and privileges under this contract were revoked, forfeited and determined for certain failures under the contract. The Court held that the contract could not be rescinded by *ex parte* action by the municipal corporation, that is, by resolution of the Council, without judicial proceedings.

Again, in the case of *Daly v. The City of Garthage*, 143 Mo. App., 564, 128 S. W., 265, it was held that where a franchise to use the streets provided that it should be void if a certain sum was

not expended within a specified time in improving the system, that failure to make such improvements did not, *ipso facto*, annul the grant.

The numerous cases cited by the appellee in its brief in the Circuit Court of Appeals to the effect that such clauses are self-executing, are not in point, for the reason that the conditions construed were imposed by State statutes, and either nothing was done pursuant to the grants in question or no property rights became vested, or there was no possession of property constructed pursuant to the grants.

(b) *The appellee has never claimed an automatic forfeiture, and by its acts has waived such claim.*

“Municipal authorities may waive the performance of conditions imposed by them and the right to enforce a forfeiture for failure to comply with such conditions.

“Waiver of the forfeiture may arise from the action of the legislative body of the municipality clothed with the authority to grant the franchise.”

McQuillin on Municipal Corporations, Vol. IV, Sec. 1667; Vol. VIII, Sec. 1667.

In the case of *State v. West End Light & Power Company*, 246 Mo., 653; 152 S. W., 76, at 80, which was a *quo warranto* proceeding, the Court said:

“We think the correct rule of law is that a waiver of the forfeiture may arise from the action of a legislative body clothed with authority to grant the franchise.”

In the case of *United Electric Lt. Co. v. East Pittsburg Borough*, 230 Pa., 65, 79 Atl., 229, at 232, it was held that the forfeiture of a franchise for failure to construct works, within the time

limited, was inequitable where the municipality had not insisted upon strict compliance with the ordinance as to time. The Court said:

“* * * Aside from the question of the effect of the resolution as an alteration of the ordinance, we regard it as an act inconsistent with the supposition that the borough council intended to hold the company to a strict compliance with the time limit fixed by the ordinance. ‘Where time of performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to this part of the agreement, will be taken to have waived it altogether.’ 29 Am. & Eng. Ency. of Law (2nd Ed.), 1104.”

In *Commercial Electric L. & P. Co. v. City of Tacoma*, 50 Pac. 592, the Supreme Court of Washington said that the forfeiture of a franchise may be waived either expressly or impliedly by recognition of its continued existence and by the assessment and collection of taxes on the franchise granted, saying:

“But, even if it could be said that plaintiff’s franchise was subject to forfeiture under the letter of the ordinance, still it appears that the city waived its right to forfeit by recognizing the ordinance as being in force long after the time it now claims the forfeiture occurred. It maintained its own wires upon the respondent’s poles. It assessed and collected taxes on the franchise granted by the ordinance.
* * * It is a well-settled rule of law that the state may waive a forfeiture of the charter of a corporation, either expressly or impliedly, by recognition of the continued existence of the corporation after the forfeiture; and it will be deemed to have done so by any act or acts clearly evincive of such an intention. (28 Am. & Eng. Enc. Law, p. 568.) The same doctrine is equally applicable to municipal corporations.”

The appellee has never claimed that the grant has been forfeited. Appellee's position in the Circuit Court of Appeals on its brief and reply was a distinct disclaimer of any existing forfeiture. Inasmuch as the appellee took the position in the Circuit Court of Appeals that it was not there claiming and never had claimed that the grant has been forfeited, it is not clear under what warrant the Circuit Court of Appeals decreed a forfeiture not claimed. The extracts from the appellee's brief and reply in the Circuit Court of Appeals referred to are as follows:

"(b) The Court below made the mistake of believing that the Board of Estimate and Apportionment was proceeding to take action under Section 3, Paragraph 'Seventh' (see fol. 392) of the contract of October 29, 1912, as amended. (See the Court's opinion, fol. 793, first paragraph, where he comments on the words 'the right herein granted.')

"The resolution of the Board of October 19, 1917 (fol. 151), and the notice issued in pursuance of it said that the Board would proceed under Section 5, Paragraph 'Thirteenth' of said contract. (See fol. 299.) Section 3, Paragraph 'Seventh' contained a self-executing forfeiture clause covering the franchise contract and property of the corporation and the deposit of \$15,000 (fol. 309); *while Section 5, Paragraph 'Thirteenth,' required affirmative action on the part of the Board before the franchise and property of the corporation could be forfeited and claimed by the City.*"

"In the instant case the City does not claim a forfeiture *already existing*. Nor does the City claim a forfeiture for an *existing* abandonment or non-user. The Board of Estimate and Apportionment made no claim that Section 3, Paragraph 'Seventh,' operated automatically to forfeit this franchise contract on August 23, 1917. This corporation failed to construct as directed in the Board's resolution of February 16, 1917.

"The Board had the power to and may have waived the forfeiture penalty in this Section 3, Paragraph 'Seventh.' The clause is to the effect that 'the rights herein granted' shall 'cease and determine' provided the time be not extended by the Board.

"(C) On the contrary, the Board, on October 19, 1919, *proceeded on the idea that this franchise contract was still in full force and notified this corporation, under Section 5, paragraph 'thirteenth,' to show cause why the Board should not act under this Section.*

"If the Board *decided to forfeit or did forfeit the franchise of this Company, it would not thereafter have accepted money from it for taxes, percentages of gross receipts, turn-out or crossovers.*"

We have shown above (pp. 96-97) that the forfeiture clause in paragraph Thirteenth of Section 5, under which alone the City assumed to act is inapplicable to the present facts.

If there had been a forfeiture of the grant on August 23, 1917, the following subsequent actions by the appellee would establish a waiver:

(1) The appellee never asserted any claim to a forfeiture pursuant to the provisions of subdivision Seventh of Section 3 of the grant, as amended. On the contrary, the appellee did definitely elect to proceed under subdivision Thirteenth of Section 5. (Transcript, p. 37.)

This subdivision Thirteenth of Section 5, after providing that the contract may be forfeited by a suit brought by the Corporation Counsel on ten days' notice, adds:

"or at option of the Board by resolution of said Board, which said resolution may contain a provision to the effect that the railway constructed and in use by virtue of this contract shall thereupon become the property of the

City without proceedings at law or in equity. Provided, however, that such action by the Board shall not be taken until the Board shall give notice to the Company to appear before it on a certain day, not less than ten days after the date of such notice, to show cause why such resolution declaring the contract forfeited should not be adopted. In case the Company fails to appear, action may be taken by the Board forthwith." (Transcript, p. 54.)

Thus it will be seen that the appellee, is, by its action, seeking not only a forfeiture to itself of the grant, but also the property of the railway, whereas, under subdivision Seventh of Section 3 of the grant the appellee (if the facts warranted a forfeiture) could only claim a forfeiture of the grant and the security put up by the Traction Corporation guaranteeing completion of the extension.

(2) Subsequent to August 23, 1917, the Traction Corporation paid to, and the appellee accepted various payments of (a) taxes, (b) payments under the franchise itself of gross percentages of receipts, (c) track rentals, etc. (Transcript, pp. 16, 17, 49, 88.)

(3) In August, 1919, appellants, as receivers of the Traction Corporation, made application to the Public Service Commission of the State of New York for authority to charge a higher fare, on the ground that the franchise fare was inadequate. The appellee obtained from the New York Courts a writ of prohibition, prohibiting the Public Service Commission from hearing or acting upon the appellants' said petition, upon the ground that the grant to the Traction Corporation was upon condition that it would not charge a fare in excess of five cents for a single ride. Thus, in August, 1919, and subsequently, the appellee is not only insisting that the grant is in existence, but is seek-

ing, by Court action, to hold the Traction Corporation to a contract provision of the grant which it claims is beyond the power of the State to modify.

People ex rel. City of New York v. Nixon, et al., 229 N. Y. 356.

To summarize: the provision in the grant requiring completion within a stated time, is a condition subsequent, breach of which is not, as a matter of law, self-forfeiting, or self-executing. Even if it were self-executing, the appellee has never asked any court to decree an automatic forfeiture, and has by its own action asserted the existence of the grant and waived the forfeiture, if any. The Circuit Court of Appeals, therefore, in holding, as a matter of law, the grant and the railway has been forfeited, not only held contrary to the law and the facts, but decided an issue not presented or before it for decision.

B.

The Board in passing the resolution of forfeiture would not be acting legislatively.

In this case we are dealing with specific facts and not necessarily with general theories. And it was herein also that the Circuit Court of Appeals went astray. It treated the situation as one to be solved by the application of general principles respecting state sovereignty and legislative power; whereas a careful analysis of the specific statute under which the Board assumed to act will disclose that such principles are wholly inapplicable to the peculiar circumstances.

While we have chosen to advance the proposition in the above caption B as proper to be argued

in controversion of the view entertained by the Circuit Court of Appeals (opinion, Record, pp. 144-147; 266 Fed. R., pp. 634-636), it is to be noted that the injunction order (pp. 122-127) made by the District Court was not confined to restraining the Board of Estimate, and its members named in the preamble to the order (p. 125), but it also enjoined (pp. 125-126) the Engineer, Chief of the Bureau of Franchises of the Board, the Secretary of the Board, and all public officials, agents, servants, engineers, attorneys and all persons or corporations employed or retained for the purpose of doing any of the specific things enjoined, *unless after application to the Court and notice* (p. 126). It then enjoined any steps by any of those enjoined to forfeit or affect the franchise or privileges under the contract and amendments; or interference with the railway, equipment, property and assets; or taking steps as contemplated in the resolution; or preliminary to the forfeiture, or to forfeit the property on deposit, or preventing the exercise of the franchise or interfering with the Receiver's administration, except from taking steps to review or modify the order.

In other words, the District Court considered that the entire matter was a question of legal right to be judicially considered, and it enjoined all further action until application should be made to the Court, when it reserved the power to modify. Whatever may be the limits or extent of the legislative power of the Board of Estimate and Apportionment, there were matters here enjoined which went beyond any theory of the exercise or boundaries of legislative power and fell within the unquestionable boundaries of administrative action. If the Court fell into error in invading a legislative province, this did not make the order

entirely unjustifiable; if the legislative function existed, the interpretative function still resided in the Court and the administrative function in the officers and agents enjoined. And the Circuit Court of Appeals recognized this fact, but to a too limited extent; by their decree they reserved the judicial function to be exercised only when the administrative powers invaded *visible* and *tangible* property (Decree on Reversal, pp. 150, 151). But this reservation was not adequate, and constituted judicial error, for it reserved no right to inquire judicially whether the exercise of the legislative power involved the consequence of forfeiture of the entire right to operate over the whole route.

It is true that the Circuit Court of Appeals expressed the opinion (without indicating that it had analyzed the various forfeiture clauses as we have done, *supra*, p. 94 *et seq.*) that the franchise automatically ceased and determined (opinion, Transcript, p. 146; 266 Fed. R., p. 637). But we have demonstrated (*supra*, p. 109), that the franchise did not automatically cease and determine, and if any franchise was subject to forfeiture, it was merely the franchise in respect to the *uncompleted* "*portion*" of the street surface railway, and not the completed portions. We have also demonstrated (*supra*, p. 94 *et seq.*) that sections 3, subdivision SEVENTH, and section 5, subdivision THIRTEENTH (which the Circuit Court of Appeals construed—opinion, p. 149; 266 Fed. R., p. 625—as though they were cumulative provisions in respect to the same default) really related to different defaults and were therefore mutually exclusive, and that only the first of these as modified by the final contract applied to the forfeiture for failure to complete the *fourth* section of the railway (*supra*, p. 94 *et seq.*).

So that, even if the Circuit Court of Appeals was right as to the legislative character of the power to be exercised by the Board, it was still in error as to the extent of the forfeiture, and consequently as to the extent of its reversal.

The inherent character of the power conferred upon the Board of Estimate and Apportionment.

In New York State, a City or its designated authorities in entering into a contract for the construction and operation of a street railway act in the exercise of two different powers which do not need to be confused: *first*, the power conferred by the legislature; *second*, the power conferred by the Constitution in Art. III, sec. 18:

“The legislature shall not pass a private or local bill in any of the following cases:

Granting to any private corporation, association or individual the right to lay down railroad tracks”

“The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws.

But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of the property owners can not be obtained,” &c.

In the making of a grant the municipality if empowered by the legislature acts as the delegate of the legislature and within the strict limits of the power delegated (*People ex rel. City of New York vs. New York Railways Co.*, 217 N. Y. 310, at pp.

315, 316); in the exercise of the constitutional power, the local authorities may attach conditions to their consent; but the assent is not a part of the franchise; "it was but a step in the grant by the *State* of a single, undivisible franchise." And while the City may attach conditions to its constitutional assent, they must not be destructive of the *franchise* (which still emanates from the *State*) or repugnant to constitutional or statutory provisions relating to it.

People ex rel. City of New York vs. New York Railways Co., 217 N. Y. 310, at p. 318.

The legislature had by sec. 179 of the Railroad law (*supra*, p. 100) prescribed the penalty for non-completion, and thus taken this penalty out of the power or control of the City, and had fixed the period after which the franchise "*may* be forfeited." The City could not as a condition of its assent or on the exercise of its power to contract shorten this period or make the forfeiture for non-completion self-operative; this would violate or be inconsistent with the Railroad law which was operative both upon the City and upon the contract, both by virtue of the law and the terms or the contract.

The power to prescribe the terms of forfeiture was conferred, not by the Constitution, but by the City Charter, sec. 73 (*infra*, pp. 129, 135), and the forfeiture thus provided for (at the option of the City as to whether it should be accomplished by forfeiture "or otherwise") was only

"to secure *efficiency* of public service at *reasonable* rates and the *maintenance* of the *property* in good condition throughout the full term of the grant."

The forfeiture thus authorized (but not made imperative) was to secure reasonable rates and

maintenance; for by section 179 of the Railroad law, the *legislature itself* had prescribed the condition, period and character of forfeiture for *non-completion*; and having so exercised the legislative power, the City could not provide otherwise.

It will be noted, too, that the line of cleavage and the distinction between *construction* and *operation* has its origin in the very section of the Constitution (*supra*, p. 120) from which the local authorities get their power to assent; and that distinction is preserved in the statutes; for non-completion, which must precede operation, the legislature has itself provided, and this excludes municipal action; for *non-efficiency* and for *improper maintenance*, the legislature has provided that the City authorities may by *contract* establish the penalty, whether *forfeiture* or *otherwise*.

That the City in the exercise of its delegated or legislative power may not by resolution compel what it is not specifically empowered to exact, is established by

People ex rel. City of Olean vs. Western New York and Pennsylvania Traction Co., 214 N. Y. 526.

People ex rel. City of New York vs. New York Railway Co., 217 N. Y. 310.

Village of Carthage vs. Central N. Y. Tel. Co., 185 N. Y. 448.

It is apparent from *City of New York vs. Bryan*, 196 N. Y. 158, that the Railroad law contemplated, and the general law requires, that the claim of forfeiture for non-completion is not a matter to be determined by municipal authorities "without proceedings at law or in equity" (Proposed resolution, p. 37), but is a judiciable controversy dependent upon facts and legal and equitable right to be first adjudicated by the Courts in action or

suit to which the People of the State are a party (at p. 168).

That the State has such an interest in a street railway that a City can not consent to its abandonment was established by *Paige vs. Schenectady Railway Co.*, 178 N. Y. 102, at p. 113.

That a *contract* right of a municipality against a railroad company is a justiciable private right is shown by *People vs. Rome, Watertown and Ogdensburg Railroad Company*, 103 N. Y. 95, at p. 106.

When the legislature had exercised its power and prescribed the limitations and conditions of the power to grant a franchise, it is not competent for the City authorities to exact another condition upon which the franchise can be held.

Beekman vs. Third Ave. R. R. Co., 153 N. Y., 144 at p. 158.

A provision in a statute that in default of construction a railroad shall "forfeit the rights acquired" is not self-operative.

"By such non-performance a corporation is not, *ipso facto*, dissolved or deprived of its corporate existence or corporate *rights*, but is simply exposed to proceedings, on behalf of the state, to establish and enforce the forfeiture."

Application of Brooklyn Elevated R. R. Co., 125 N. Y. 434, 440.

It is not to be forgotten or overlooked that the Railroad law, subject to which the Board exercised its powers, and which was attached as a condition by section 6 of the Contract of October 29, 1912 (Transcript, p. 57), provided by section 184 for an abandonment of a part of a railroad

route with the approval of the Public Service Commission, and when so approved, such portion shall be deemed to be abandoned (see *People ex rel. N. Y. & Queens Co. Ry. Co. vs. Public Service Commission*, 173 Ap. Div. 826). The provision for forfeiture of the whole road for failure to complete a portion, would be inconsistent with the purpose indicated in this section.

When the legislature has prescribed a term not to exceed twenty-five years, it is not afterward in the power of the local authorities to consent to a longer term; and such consent is not deemed a valid consent for the prescribed term.

Blaschko vs. Winsted, 156 N. Y. 437, 444.

The appellee has neither express nor implied power to impose a forfeiture either of the grant or the railway property for failure of the Traction Corporation to construct an extension of its railroad.

It has been frequently determined by decisions of this Court that municipal authorities are political subdivisions or agents of the state, and possess only such powers as are expressly granted or fairly implied from express grants of power, and that when a municipality seeks to exercise a sovereign power, specific authority therefor must be shown, as general powers are not sufficient. The affixing of the conditions of a grant is an exercise of sovereignty.

Milwaukee Elec. Ry. Co. v. Wisconsin R.

R. Comm., 238 U. S. 174, 180;

Home Telegraph Co. v. Los Angeles, 211

U. S. 265, 273;

Detroit Citizens St. R. Co. v. Detroit Ry.,

171 U. S. 48, 53.

The New York State authorities are to the same effect.

See

People ex rel. City of New York v. New York Railways Co., 217 N. Y. 310, 316, and cases there cited.

The New York authorities agree that a municipality does not grant a franchise, even where there is the constitutional requirement that no street railway shall be constructed or operated without the local consent. Equally the franchise right to be a street railroad corporation, and the special franchise right to construct and operate a railway spring from the State.

Beekman v. Third Ave. R. R. Company, 153 N. Y. 144, 152;
City of New York v. Bryan, 196 N. Y. 158, 165-6.

Quoting from *The City of New York v. Bryan* (*supra*):

"It is true that since the adoption of the constitutional amendment of 1875, no act of the Legislature can authorize the laying of railroad tracks in the streets, without the consent of the local authorities. That in no way modifies the principle that the grant proceeds from legislative authority."

Quoting from *Beekman v. Third Avenue Railroad Company* (*supra*):

"The authority to make use of the public streets of a city for railroad purposes primarily resides in the State, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source,

whatever may be the agencies through which it is conferred * * *. The city authorities have no power to grant the right except in so far as they may be authorized by the Legislature, and then only in the manner and upon the conditions prescribed by the statute. (Citing cases.)

The power of the Legislature to authorize the grant of such a franchise by local authority is limited by the Constitution and forbidden, except in cases where the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of the street or highway upon which it is proposed to construct or operate such railroad, be first obtained (Art. 3, Sec. 18). The Legislature, however, in virtue of its general power over municipalities, may regulate the mode and manner in which such consent shall be given by the authorities having the control of the street, and may prescribe the conditions upon which it may be given, and all these matters have been regulated by statute."

The New York authorities are also uniform on the proposition that when the Legislature has enacted the conditions which a municipality may annex to its consent, then the Legislature is supreme, and a municipality is limited in its action in matters authorized under the legislative enactment, and any contract by it repugnant to existing statutes is a nullity.

A recent recognition of this proposition is found in *Matter of Quinby v. Public Service Commission*, 223 N. Y. (at pages 260-261):

"It has been held that the Legislature may, by virtue of its general power over municipalities, regulate the mode and manner in which the consent of the local authorities to the construction and operation of street railroads shall be given, and *may regulate and*

limit by statute the conditions upon which it may be given."

Beekman v. Third Ave. R. R. Comm., 153 N. Y. 144, 158:

"The sovereign power having regulated the whole subject, it is not competent for the city authorities to make further and different regulations in the absence of express legislative authority."

Village of Phoenix v. Cannon, 195 N. Y. 471, 474:

"Primarily the power to grant franchises in the public streets, resides in the State. Municipalities have only such power in this regard as has been delegated to them by the Legislature. * * * The statutory regulations on this subject are now incorporated in the railroad law, and the question whether the defendant's contention is well founded or not must be determined in the light of that statute."

In *People ex rel. South Shore Traction Company v. Wilcox*, 196 N. Y. 212, the Court, in discussing the effect of conditions of local authorities in conflict with enactments of the Legislature, says at page 217, as follows:

"So far as the consent of the municipal authorities to the construction of the proposed line may be limited by conditions which are in conflict with the provisions of the Public Service Commissions Law, it is enough to say that the statute must prevail and such conditions are simply nugatory."

City of Troy v. United Traction Co., 202 N. Y. 333, 341.

"No act has been called to our attention that gives the plaintiff power and authority

to enact an ordinance inconsistent with the Public Service Commissions Law."

In *People ex rel. Cohoes Railroad Company v. P. S. C.*, 143 App. Div. 769, 778 (affirmed 202 N. Y. 547), it is held that a municipality cannot, by a franchise, grant a higher fare than is permitted by the Legislature.

People ex rel. City of New York v. Nixon, 229 N. Y. 356, 362.

"We are now asked to hold that the municipalities by their contracts may nullify existing statutes. We will not go so far."

That a contract by a municipality in excess of its power to contract is a nullity is the holding of this Court and other tribunals.

Ottawa v. Carey, 108 U. S. 110, 121-2.

"Municipal corporations * * * have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporations as created and established * * *. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect."

Keefe v. Lexington & B. St. Ry. Co., 185 Mass. 183;

Blodgett v. Wooster Consolidated St. Ry. Co., 192 Mass. 106;

Arcata v. Green, 156 Cal. 759.

A contract of a corporation beyond the powers conferred upon it by the Legislature is void.

Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24;

Oregon Ry. & Navigation Co. v. Oregon Ry. Co. Ltd., 130 U. S. 1;

McCormick v. Market Bank, 165 U. S. 538;

Louisville, etc. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, at 572.

Before, therefore, the appellee can claim, as a matter of law, a right to forfeit the grant and the property of the railway for failure to make an extension of a part of the railway, it must first show an express delegation of power from the Legislature conferring upon it the right to affix such a condition to its grant. It is stated in the opinion of the Circuit Court of Appeals that such express delegation of power is found in the words taken from Section 73 of the Greater New York Charter:

“Every grant shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates * * *” (Transcript, p. 143).

The words quoted, together with the words to complete the sentence, namely, “and the maintenance of the property in good condition throughout the full term of the grant” constitute the sole delegation of power to the municipality to provide or impose conditions of forfeiture in its grants. This delegation of power is limited to providing for a forfeiture *for a failure to furnish efficient service or maintain the property*. Obviously, construction of an extension of part of the road falls neither under the head of efficient service or maintenance of property. Conceivably,

after the road is constructed, it is the duty of the utility to provide efficient service and to maintain its property. Accordingly, there is not even a fair implication from the language used that there has been a grant of power to provide for a forfeiture of the grant for failure to construct an extension of the railroad. But the grant of power the Circuit Court of Appeals found was lodged in the municipality of the City of New York extends much further, for said Court holds that by such language the appellee has been granted the power not only to forfeit the "grant," but the "railway."

That said language of Section 73 of the New York City Charter is a delegation of power to provide in franchises for forfeitures of the grant or railway, is negatived by Section 179 of the New York State Railroad Law, which, so far as pertinent, is as follows:

"In case any street surface railroad corporation shall not commence the construction of its road, or of any extension or branch thereof, within one year after the consent of the local authorities and property owners or the determination of the Appellate Division of the Supreme Court as herein required, shall have been given or renewed, and shall not complete the same within three years after such consents or determination shall have been obtained, its rights, privileges and franchises in respect of such railroad or extension or branch, as the case may be, *may be forfeited*. If the performance of any act required by this chapter or any prior acts within the times therein prescribed, is hindered, delayed or prevented by legal proceedings in any court, such court may also extend such time for such period as the court shall deem proper or if the performance of any act required by said statutes within the times therein prescribed is hindered, delayed or pre-

vented by works of public improvement, or from any other or different cause, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hindrance, delay or prevention." (Sec. 179 of the New York Railroad Law, L. 1910, Ch., 481.)

Section 45 of the Greater New York Charter provides:

"Nothing in this act contained shall * * * repeal or affect the existing general laws of the state in respect to street surface railroads."

By Section 6 of the franchise it is specifically provided that the grant is upon the condition that the provisions of the Railroad Law shall be complied with. (Transcript, p. 57.) Therefore, not only by the rule of law that existing statutes are a part of the grant, but by the grant itself, and the provisions of the New York Charter, Section 179 of the Railroad Law is a part thereof. Such section being a state law will prevail over a contract of its agent repugnant to the declared statutory rule of the sovereign in respect to the subject matter covered.

Appellants respectfully submit that the statement of the New York Court of Appeals in *People v. Nixon*, 229 N. Y., 356, 362:

"We are now asked to hold that municipalities by their contracts may nullify existing statutes. We will not go that far,"

equally applies to the contention that the appellee has been granted the power to declare a forfeiture of the grant and railway, not only in the absence

of any express delegation of power, but in contravention of express statutory provisions of the state covering the same subject.

Authorities Upon the Legislative Character of Resolutions of Forfeiture.

The only judicial authority cited by the Circuit Court of Appeals upon the proposition that the resolution of forfeiture was a legislative act is *Edson v. Olathe*, 81 Kans. 328, 331.

We show below many cases to the contrary (*infra*, pp. 170-172).

In this case it was decided that a city is not liable in *damages* for the repeal of an *ordinance* by which it grants a franchise, though the railway company complies with its conditions. It clearly distinguishes (p. 330) a case of ministerial execution of work laid out by an ordinance after legislative discretion has ended. The injunction order in our case, not only concerned the passage of the resolution, but also steps to put it into effect. It appears in the opinion of the Kansas Court that these, at least, are distinguishable from legislative action. In the case cited the publication of the ordinance was deemed an essential part of the exercise of the legislative function because the ordinance of repeal did not become effective as law until so published. The Court was of the opinion that the *municipal corporation* in exercising a *governmental* function dissociated from a private proprietary corporate right shares the sovereign's immunity from suit, and that consequently subsequent municipal acts for the public welfare to put an ordinance into effect did not give a cause of action in *damages* against the municipal corporation, and that this was true even though the ordinance might be void, and even though it

deprived the company of property without due process of law (p. 334). But (p. 335) it is still clearly recognized that if the officials acted in bad faith the city might be enjoined, though they could not subject it to damages.

In denying a motion for rehearing (*Edson v. Olathe*, 82 Kan. 4) the Court showed that the only cause of action asserted was for *damages* for the passage of the repealing ordinance (p. 5); and again stated that in passing the repealing ordinance the mayor and council were the legal equivalent of the state legislature; and that the ordinance was a public law and that no private proprietary interest of the city was involved. Yet it expressly said that from the face of the petition the ordinance was void, and (p. 6):

“If proper application had been made to any Court having jurisdiction the ordinance would have been adjudged to be a nullity and all the *officers* and *agents* of the city would have been *restrained* and *enjoined* from enforcing the ordinance and from disturbing the plaintiff in the enjoyment of its *franchise* rights.”

So far, therefore, is this case from being an authority for refusing the *injunction* against the agents of the city, if the forfeiture was unauthorized, that it is direct authority for the proposition that injunction against the city's agents is the proper remedy in such cases.

But in this case, we submit, the passage of the resolution of forfeiture would not be a legislative act.

It would be distinctly an exercise of private proprietary rights asserted by the city and denied by

the Receivers. The thing which the city essayed by the terms of the proposed resolution to forfeit was (Transcript, p. 37) the *contract*, and the *railway* constructed and in use, without proceedings at law or in equity; and it asserted this right, not by virtue of any grant of power from the legislature, but specifically and solely

“under and pursuant to the provisions of Section 5, THIRTEENTH”

of the *contract*.

In asserting rights under a contract, a city board is not exercising a power to legislate, but is asserting a private proprietary right; and in forfeiting the property it was enriching the municipal corporation (See further discussion of this topic, with reference to cases in this Court, *infra*, pp. 170-172).

The character of the power to be exercised by the Board of Estimate and Apportionment in a resolution for the forfeiture of franchise and property is, in a measure, at least to be determined by the examination of the statute conferring power upon this Board in respect to the subject matter.

This statute will be found in sections 72, 73 and 74 of the Charter of the Greater City of New York (Ash's 4th Edition, 1918, pp. 87 *et seq.*). A copy of the several sections is as follows:

[Greater New York Charter, Chapter III, Title I, Franchises.]

“Franchises to be granted by Board of Aldermen or Board of Estimate and Apportionment.

“Sec. 72. Every grant of or relating to a franchise of any character to any person or corporation must, unless otherwise provided in this act, be by ordinance of the board of

aldermen or by resolution of the board of estimate and apportionment *or a contract* executed by or under the authority of the said board of estimate and apportionment, provided that every such ordinance, resolution or contract shall be subject to the provisions of this act with respect to approval by the mayor. But this section shall not apply to any franchise, right or contract authorized by the board of rapid transit railroad commissioners of The City of New York (As amended by L. 1905, ch. 629, Sec. 10)."

"Limitation and conditions to grants of franchises.

Sec. 73. After the approval of this act *no franchise or right to use the streets, avenues, waters, rivers, parkways, or highways* of the City shall be granted by any board or officer of The City of New York under the authority of this act to any person or corporation for a longer period than twenty-five years, *except as herein provided*, but such grant may, at the option of the city, provide for giving to the grantee the right on a fair revaluation or revaluations to renewals not exceeding in the aggregate twenty-five years. Nothing in the foregoing provisions of this section contained shall apply to consents granted to tunnel railroad corporations, nor shall anything in this section or in this title contained apply to grants made pursuant to the rapid transit act, Chapter four of the laws of eighteen hundred and ninety-one or the acts amendatory thereof. The board of estimate and apportionment is hereby authorized, in its discretion to grant a franchise or right to any railroad corporation to use any of said streets, avenues, waters, rivers, parkways or highways in The City of New York for the construction and operation of a tunnel railroad underneath the surface thereof for any period not exceeding fifty years, and any such grant may at the option of the city provide for giving to the grantee the right, on a fair revaluation or re-

valuations, to renewals not exceeding in the aggregate twenty-five years, provided, however, that any grant to construct a tunnel railroad or renewal thereof, shall only be made after an agreement has been entered into by such a tunnel corporation to pay to The City of New York at least three per centum, of the net profits derived from the use of any tunnel which it shall construct, after there shall have first been retained by such company from such net profits a sum equal to five per centum upon the sum expended to construct such tunnel. *At the termination of any franchise or right granted by the board of estimate and apportionment all the rights or property of the grantee in the streets, avenues, waters, rivers, parkways, and highways shall cease without compensation.* Every such grant of a franchise and every contract made by the city in pursuance thereof may provide that upon the termination of the franchise or right granted by the board of estimate and apportionment the plant of the grantee with its appurtenances, shall thereupon be and become the property of the city without further or other compensation to the grantee; or such grant and contract may provide that upon such termination there shall be a fair valuation of the plant which shall be and become the property of the city on the termination of the contract on paying the grantee such valuation. If by virtue of the grant or contract the plant is to become the city's without money payment therefor, the city shall have the option either to take and operate the said property on its own account, or to lease the same for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same property, excluding any value derived from the franchise; and if the city shall make payment for such plant it shall in that event have the option either to operate the plant and property on its own account or to lease the

said plant and property and the right to the use of streets and public places in connection therewith for limited periods, in the same or similar manner as it leases the ferries and docks. *Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant.* The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for. (*As amended by L. 1905, ch. 629, Sec. 11.*)”

“Proceedings prior to grant of franchise.

Sec. 74. Before any grant of a franchise or right to use any street, avenue, waterway, parkway, park, bridge, dock, wharf, highway or public ground or water within or belonging to the city shall be made by the board of estimate and apportionment, a public hearing shall be held upon the petition therefor, at which citizens shall be entitled to appear and be heard. No such hearing shall be held, however, until notice thereof, and the petition in full shall have been published at least ten days in the City Record, and at least twice, at the expense of the petitioner, in two daily newspapers published in the city, to be designated by the mayor. The board of estimate and apportionment shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and shall embody the result of such inquiry in a form of contract, with all the terms and conditions, including the provisions as to rates, fares and charges. Such proposed *contract*, together with the form of resolution or resolutions for the granting of the same shall, but not until after the hearing upon the petition, be entered on the minutes of the board of estimate and apportionment, and

such board shall, not less than twenty-seven days after such entry and before authorizing such *contract* or adopting any such resolution, hold a public hearing thereon at which citizens shall be entitled to appear and be heard. No such hearing shall be held until after notice thereof, and the proposed contract and proposed resolution of consent thereto, in full, shall have been published for at least fifteen days, except Sundays and legal holidays, immediately prior thereto in the City Record, nor until a notice of such hearing, together with the place where copies of the proposed contract and resolution of consent thereto may be obtained by all those interested therein, shall have been published at least twice at the expense of the proposed grantee in the two daily newspapers in which the petition and notice of hearing thereof shall have been published. Every contract or resolution containing or making such grant, shall require the concurrence of members of the board of estimate and apportionment entitled, as provided by law, to three-fourths of the total number of votes, to which all the members of the said board shall be entitled, and the votes shall be shown by the ayes and noes, as recorded in the minutes of the board. The separate and additional approval of the mayor shall be necessary to the validity of every such contract or resolution.

This act shall apply to any renewal or extension of the grant or leasing of the property to the same grantee, or to others, within five days after the final execution of any contract made pursuant to any such resolution or any such authorization, a copy of which contract, together with such resolution, duly attested by the secretary of the board of estimate and apportionment shall be transmitted to each of the following: The comptroller, the corporation counsel, the city clerk and the public service commission for the district having jurisdiction, to be preserved by them in the archives of their department or offices.

All such certified copies shall be deemed to be public records. (As amended by L. 1914, ch. 467, which repeals former Sec. 74.)"

While sections 72 and 74 throw light upon the nature of the power to grant and the method of its exercise, section 73 is the specific section which deals with forfeiture, and it does not provide for the exercise of any sovereign or legislative power by the Board in respect to forfeiture. The law itself (so far as pertinent to the present controversy) prescribed that (*supra*, p. 136):

1. At the *termination* of any franchise or right granted by the Board,

All the rights or property of the grantee of the grantee in the streets, avenues and highways shall cease without compensation.

But the "*termination*" mentioned, is the termination of the *period* prescribed in the grant; and the provision is not a provision for forfeiture but that there shall be no compensation for the rights or property in the streets when the franchise terminates by the expiration of the period limited in the grant, which under the statute, for such a railroad as this can not exceed twenty-five years unless the grant, at the option of the City shall be renewed for not to exceed an additional term of twenty-five years.

There is no statutory provision, self-operative, and no grant of legislative power to the Board to terminate, in the exercise of such power, the franchise, the property or the rights, before the expiration of the period fixed in the grant, under this section. But the law also prescribes (*supra*, p. 136) that:

2. the grant of a franchise, and the contract made by the city in pursuance thereof

may provide that upon the *termination* of the franchise or right granted by the Board the plant with its appurtenances shall become the property of the City without further or other compensation; or such grant and contract *may* provide that upon *such termination* there shall be a fair valuation of the plant which shall become the property of the City on the *termination* of the *contract*, on payment of such valuation.

But still, the idea of forfeiture has not entered the statute; the *termination* is the expiration of the fixed period; and the distinction between the grant and the contract is preserved; the grant may be an exercise of legislative power, but the *contract* is an instrument of agreement, not unlike other contracts, and is not itself a legislative act, though section 72, (*supra*, p. 134) prescribes that it shall have the approval of the Mayor.

The law continues to preserve the distinction between grant and contract (*supra*, p. 136) when it also prescribes that:

3. If by virtue of the grant or contract the plant is to become the City's without money payment, the City shall have the option to operate or to lease for a limited period.

And finally, the sole *forfeiture* provision of the statute (sec. 73, *supra*, p. 137) prescribes that:

4. "Every grant shall make adequate provision by way of *forfeiture* or *otherwise*, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant."

It is therefore *not* a legislative act to terminate a franchise; the State legislature has not prescribed forfeiture as a duty of the Board; but "adequate provision." It is optional with the Board at the time of the grant, not later, what provision it shall make and whether by way of forfeiture or *otherwise*, and then, only to secure efficiency, reasonable rates and maintenance; but not construction. If the Company does not complete *construction*, that is expressly taken care of by section 179 of the Railroad Law (*supra*, p. 130); and the penalty is not committed to the Board of Estimate and Apportionment; in case of failure to complete within three years, there may be a forfeiture, but then it may be only the *extension* which is forfeited; and the forfeiture is permissive and not imperative, and such forfeiture can only be effected by judicial proceedings.

A forfeiture of a franchise can only be adjudicated in a litigation between the people of the State and the grantee of the franchise.

In the case of *City of New York v. Bryan*, 196 N. Y., 158, The City of New York sought to have it adjudicated that certain franchises granted by it had ceased and determined for failure on the part of the grantee to fully comply with the conditions of the grant with respect to the construction of a tunnel within the time required. The Court of Appeals in holding that the right of the grantee to use the streets of the City of New York could only be determined in a litigation between the *People of the State*, and the claimants thereto, stated in part as follows:

"However that may be, the legal status of that franchise and the rights of the defendants, or the company to which they succeeded,

to the property and structures created in the execution of the franchise should be determined only in a litigation between the people of the state, from whom the franchise sprang, and the defendants, wherein a determination will be binding and conclusive on everybody, and not in a suit between the defendants and third parties, unless it is absolutely necessary so to do."

The case of *New York Electric Lines v. Empire City Subway Co.*, 201 N. Y., 321, does not announce a contrary doctrine. There the issue presented was as to whether or not the municipal consent amounted to more than a revocable license, the same not having been acted upon and not having become a vested property right. It was held that prior to action thereon the permission "would be but a license merely revocable at the pleasure of the City."

The Court also held that this was not a case of a forfeiture of a grant, and, therefore, the rule that an action of forfeiture could be had only by the State acting through its attorney-general did not apply to this case:

"We are aware that there are many cases in which the granting of a franchise and its acceptance is spoken of as creating a right of property, but generally in those cases there had been partial performance and the question now presented was not raised. We are also aware that there are cases which tend to support the doctrine that a forfeiture of a franchise can only be adjudicated at the instance of the State, acting through its attorney-general. But the question now presented is not one of forfeiture. It is as to whether the consent ever amounted to more than a revocable license."

That the New York State rule in respect to adjudication of a forfeiture of a franchise can only

be in a litigation between the People of the State and the grantee of the franchise is recognized in the case of *Village of Fredonia v. Fredonia Natural Gas L. Co.*, 169 App. Div. (N. Y.), 694, where it is stated as follows:

“The accepted doctrine that only the sovereign power can assert a breach of condition of a corporate franchise by action in the nature of *quo warranto* (*Elizabethtown Gas Light Co. v. Green*, 46 N. J. Eq., 118; *Joyce Franchises*, Sec. 486) is recognized in this State. (*City of New York v. Bryan*, 196 N. Y., 158.)”

In the *contract* the Board exercised the option, and prescribed the conditions and extent of forfeiture which we have already analyzed (*supra*, p. 94 *et seq.*). In view of section 179 of the Railroad law (*supra*, p. 130), it may indeed have exceeded its powers in providing any forfeiture for non-completion; but we are not now concerned with that. We are only considering whether in declaring a forfeiture the City was exercising a legislative function.

Thenceforth, the terms of forfeiture (if valid) were prescribed by contract; and no legislative act could precipitate or change them. To the extent of the validity (if any) of the forfeiture clause, but only under the conditions prescribed in the contract, the City, could by appropriate action through the proper authority, avail itself of any forfeiture incurred, but only as a party to a contract; and like any other party to any contract with an insolvent corporation it was amenable to the restraining hand of a Court of Equity, whose receivers were operating under the franchises, to keep the City, from making precipitate or unjust use of such rights as it might have under its contract, until it should have demonstrated to the sat-

isfaction of the Court, that it was entitled to exercise the rights which it claimed. And this the District Court by its restraining order properly did.

The right to forfeit, the manner of exercising the right, and the extent of the forfeiture were all justiciable and not legislative questions; they were rights founded in contract and not in statute; the statutory termination had not taken place, and the statutory cessation of right had not arrived. and the statutory implication of the method to be pursued for the enforcement of the permissive forfeiture for non-completion of construction was not being pursued. Whatever right there was, was purely a creature of contract, entered into by and pursuant to statutory authority; but the right of forfeiture was contractual, not statutory; and its exercise was proprietary and not legislative.

The distinction between a law and a contract and the exercise of legislative power and of contract right is illustrated by the recent decision in this Court in

Southern Iowa Electric Co. vs. City of Chariton, decided April 11, 1921, not yet officially reported.

This case and the authorities which it cites show clearly the reasons why a municipal corporation may in some instances be given the power to contract and in others may have only the legislative power.

In the present case, now before this Court, in some matters the legislature exercised the legislative power and left no power with the Municipal Corporation to change the effect of the legislation (*e. g.* Railroad law s. 179, *supra*, p. 130); in other matters it left the option with the Municipal body, whether it should legislate or contract

(*e. g.* N. Y. City Charter s. 72, *supra*, p. 135); in still others it contemplated a contract (*e. g.* N. Y. City Charter s. 73, *supra*, p. 136), in which case, as illustrated by the controversy last cited above, the power to contract must be exercised within the limits imposed by the legislature (except as conferred directly by N. Y. Constitution Art. III, s. 18, upon "local authorities" as a condition of their consent—a constitutional grant of power not yet definitively construed and not necessary now to discuss; though discussed in the *Quimby* case, 223 N. Y. 260, 227 N. Y. 602, and in *People ex rel. Nixon vs. Garrison*, 229 N. Y. 595, 645, 647). We have already shown that the legislature by sec. 179 of the General Railroad law had fully legislated with respect to the penalty for failure to construct an extension of a street surface railway company; and this took away from the Municipal Board the power to contract for another penalty or another period; while the legislature had by section 73 of the New York City Charter (*supra*, p. 137) conferred upon the Municipal Board the power to contract with reference to the maintenance of service and rates upon a completed and operating railroad, and the option to provide in such contract whether such service and rates should be enforced by forfeiture or otherwise; but such power did not include the power to contract for forfeiture for non-completion within a period to be fixed by the Board.

The opinion in the last cited case in this Court (*supra*, p. 144) quotes with approval from *Ottumwa Ry. & Light Co. vs. City of Ottumwa*, 178 N. W. 905, where it recognizes the distinction between ordinance, resolution and contract of a municipal body.

The distinction which we make is also illustrated by *City of San Antonio vs. San Antonio Public*

Service Company, No. 263, Oct. Term, 1920, in this Court, decided Apr. 11, 1921, not yet officially reported.

HENCE THE DISTRICT COURT WAS NOT INTERFERING WITH ANY SOVEREIGN RIGHT OR LEGISLATIVE POWER IN ISSUING ITS TEMPORARY INJUNCTION.

C

The Receivers and the Traction Company had legal excuse for non-compliance.

We have shown the facts at length, (*supra*, p. 48 *et seq.*).

The Circuit Court of Appeals (Opinion, p. 147; 266 Fed. R. p. 638) calls attention to the *proviso* of the contract of January 21, 1916 (Transcript, pp. 68-72). This contract modified the original contract of October 29, 1912, by inserting this proviso respecting completion of the second and last subdivision of the *fourth* "portion" of the street surface railway:

"provided that *title* to the streets involved has been vested in the City and that said streets have been *regulated* and *graded*" (Opinion, p. 147; 266 Fed. R. at p. 638; Contract, p. 70).

The Opinion recognizes as a demonstrated fact, from the record that (Opinion, transcript, p. 147; 266 Fed. R. p. 638)

"There were seven parcels on Lambertville Avenue where the grading was not completed to the full width. But those parcels did not extend one-half way across the sidewalk of that street, and did not in a single instance touch or affect the grade of the 40-foot roadway, or interfere in any way with the *construction* of the trolley line."

We submit that the recognition of this fact, (while, as we have shown above, p. 69, this was not the entire fact), should have confirmed the opinion of the District Judge (Transcript, p. 133), quoted by the Circuit Court of Appeals (at place cited, Opinion, p. 147; 266 Fed. R., p. 638):

“The City is not even now in a position to literally demand fulfillment by the railroad. While the streets and grades are so far advanced that the road and City could, by working together, go ahead without modification of the contract, yet the City is not in a position where it can insist that the road must at its peril perform literally all parts of the agreement.”

The Court should not, to promote a forfeiture, strain a point in favor of the City to excuse it from complete performance; the contract did not except any part of the “street,” or confine the regulation and grading to the “40-foot roadway”; by its terms whatever was within “the street” was first to be “regulated and graded,” and it can not be judicially said that the condition precedent to forfeiture was fulfilled, though seven parcels were not completed to their full width.

But the opinion of the Circuit Court of Appeals also recognized as a fact established by the record (Opinion, transcript, p. 147; 266 Fed. R. p. 638), that

“That portion of Lambertville Avenue between Freehold Street and Medford Street had a temporary grade, conforming to the grade of the Long Island Railroad Company’s line, over which the City has a prior right of way, and the *Long Island Road* proposed to the Traction Company that it might operate its railway over a temporary trestle which might span its tracks until the Long Island Road elevated its tracks as required by the

order of the Public Service Commission when Lambertville Avenue and the Traction Company's road were to run thereunder."

In other words, in order to facilitate a forfeiture, and before the City had complied with the terms of the condition precedent to the forfeiture, the Traction Company is to be expected to waive the benefit of the condition precedent upon the tender of a concession by a third party, the Long Island Railroad, of the privilege of crossing by a trestle, instead of at a permanent grade legally established!

Legal Meaning of "regulated" and "graded."

The Circuit Court of Appeals finds its definition of "grade" in an opinion of this Court (*Smith v. Corporation of Washington*, 20 How. 135, 148), and in an opinion of the Supreme Court of Pennsylvania (*Sedgley Avenue*, 217 Pa. 313, 66 Atl. R. 546). An examination of these decisions discloses that they do not militate against our present contention. In both cases grades were *established* pursuant to law; but we submit that to resort to these authorities for the meaning of "regulate and grade" is to disregard the most obvious method of ascertaining the actual meaning of the parties, situated as they were. Both the Traction Company and the City had entered into a modification of a contract made pursuant to the Charter of the City of New York, and the City was acting through a Board established by that charter; the contract, pursuant to the Charter, provided for the use of "streets," and the proviso inserted by the modification required as a condition precedent to completion of the railway, that the "streets" should be "regulated and graded." But regula-

tion and grading of streets are themselves very definitely provided for by the self-same statute.

Since 1816 (N. Y. Laws 1816, c. 160) it has been the legislative policy of New York to award damages to abutting owners due to the regulation of streets (Ash's Greater New York Charter—4th Edition—p. 789, note) and damages due to a change of the legally established grade have been the cause of much litigation (*ibid.*, pp. 789-794).

The Act of 1816 c. 160, by various changes ultimately became section 951 of the Greater New York Charter.

The Act of 1816 in its preamble recited a memorial of the corporation of the City representing to the legislature, that the opening and improving of streets would not infrequently render it necessary that a new *regulation* should take place in the elevation or depression of streets already "regulated." It required Commissioners of Estimate and Assessment in each case to obtain from the City

"a profile or plan shewing the intended *regulation* * * * as to the elevation or depression thereof"

and it made provision for the award of damages for

"said intended regulation."

So that, from 1816, in New York City, the word "regulation" had the significance of a regulation of grade pursuant to law.

That the establishment of an original grade is a formal act, see *People ex rel. Rothschild vs. Muh*, 101 App. Div. 423; *People ex rel. Weiser vs. Tucker*, 220 N. Y. 594; *Triest vs. City of N. Y.*, 193 N. Y. 525 (*infra*, p. 155); *People ex rel. Flaxman vs. Hennessy*, 74 Misc. (N. Y.) 166, 149 App. Div. 927.

So also that "regulation" is a formal act, see *Matter of City of New York*, 167 App. Div. 807, at p. 811, *Matter of Mayor*, 84 App. Div. 312, at p. 314.

To establish a grade, the map must clearly indicate it.

Matter of Mayor, 84 App. Div. 312.

The cases above cited and others, abundantly indicate that the *legal* establishment of an original grade confers substantial rights, which in its absence can not be asserted (e. g. *Friel vs. City of New York*, 150 App. Div. 317; 208 N. Y. 555; *Kehres vs. City of New York*, 160 App. Div. 349; *Gas Engine, &c. Co. vs. City of New York*, 166 App. Div. 297; 218 N. Y. 661):

By section 951 of the City Charter as amended N. Y. Laws, 1915 c. 537, in effect January 21, 1916, statutory reference is made to "change of grade," "grade," "original *establishment* of grade by lawful authority," "originally establishing a grade," "grading," "changing an *established* grade," "special grade," "plan and profile" "level, which in the opinion of the Board of Estimate and Apportionment, constitutes a normal grade for the street and the special grade to which the street has been graded"; "departure of the grade of the street from the normal grade as shown on such plan and profile," "when any street shall have been regulated and graded." Should there be any reasonable doubt, that when the parties inserted in their contract, a *proviso*, that the streets involved should have "been regulated and graded" (p. 70) that they had in mind, both of them, that character of "regulation and

grading," which had been mentioned in statutes of New York since 1916, and which were mentioned in section 951 of the City Charter?

Section 951 of the City Charter as amended by N. Y. Laws 1915, ch. 537, as in effect January 21, 1916, is in the following words:

[Laws of New York, 138 Session, 1915, Vol. 2, Chap. 537.]

"AWARD OF DAMAGES TO BUILDING BY REASON OF REGULATION AND GRADING OF STREETS; LIABILITY IN SUCH CASES.

Section 951. All cases where a change of grade of any street or avenue has been made prior to the taking effect of this act shall, as to the liability to make compensation for damages caused by such change of grade, be governed by the laws in force at the time such change of grade was made and certified to the board of assessors. After the taking effect of this act an abutting owner who has built upon or otherwise improved his property in conformity with *the grade established by lawful authority*, and such grade is changed after such buildings or improvements have been erected, shall be entitled to damages for such change of grade. An owner of property, who has built upon or otherwise improved his property prior to the *original establishment of a grade by lawful authority*, shall be entitled to the damages caused by the grading of the street in accordance with such established grade except as herein provided, there shall be no liability for *originally establishing a grade or for changing an established grade*. Damages to such buildings and improvements shall be ascertained and assessed in connection with and as a part of the expense of grading or otherwise improving the street or avenue. All laws inconsistent herewith are hereby repealed. When any such street shall have been *regulated and*

graded, it shall be the duty of the board of assessors, after the certificate of the cost of *such regulating and grading* shall have been received by it, to cause to be published in the 'City Record' and the corporation newspapers, for at least ten days successively, a notice to all persons claiming to have been injured by the *physical regulation of the grade* of such street to present their claims, in writing, to the secretary of the board of assessors. Said notice shall specify a place where and a time when the said board will receive evidence and testimony of the nature and extent of such injury. After hearing and considering the said testimony and evidence, and after viewing and inspecting the buildings and improvements claim to have been injured by such change of grade, the board of assessors shall make such awards for such loss and damage, if any, as it may deem proper. The amount of the said awards shall be included in the *assessment for the regulating and grading of the street* in question, as a part of the expense thereof, and the said award, and the proceedings of the assessors in relation thereto, shall be subject to review by the board of revision of assessments. This section shall be applicable to any and all claims for damages for change of grade now pending before the board of assessors of the city of New York, and not heretofore confirmed."

Yet notwithstanding the use by the Legislature in 1915, in Chap. 537, of the words "Regulating and grading," in reference to a solemn act prescribed by that law, the Circuit Court of Appeals, when the same words were used shortly after in a contract with the very Board, described in said section 951 of the City Charter, said (Opinion, p. 147; 266 Fed. R. p. 638):

"the words 'legal grade and full width' are not the words used in the franchise contract.

The words found there are simply 'regulated and graded.' And *our attention* has not been *called* to any *decision* holding that words so used in such contracts mean 'regulated and graded to their legal grade and full width.' There is no discussion of the matter in the court below * * *."

We have now discussed the matter, and we submit that in view of the statute, and its language and the use of the words in judicial decisions collated in Ash's notes to Sec. 951 of the City Charter (4th Ed., pp. 789-794), there should be and can not be any reasonable doubt that what the Traction Company contracted for as a condition precedent, was the City's legal establishment, by plan, profile and completion, of a legally fixed grade for the entire width and length of the "streets involved." Yet the Circuit Court of Appeals said (Opinion, p. 148; 266 Fed. R. 639):

"To grade a street, or highway, strictly speaking, is to establish a level by mathematical points and lines and then to bring the surface of the street or highway to that level by the elevation or depression of the natural surface to the line as fixed. And we do not understand that the franchise contract under consideration means more than this as respects the City's duty to grade."

We submit that the contract without substantial doubt contemplated that the regulation and grading should be the completed act mentioned in and pursuant to Sec. 951 of the City Charter.

Since the decision by the Circuit Court of Appeals, the Court of Appeals of New York has decided *MATTER OF CRANE v. CRAIG*, 230 N. Y. 452 (advance sheets), from which it appears that under statutes of New York awards are made to abutting owners for changes of *grade* in public

streets. The opinion of the Court and the statutes cited repeatedly use the term "change of grade," not "change of legal grade," yet it can not be gainsaid, that what is under consideration in both statutes and opinion of the Court is the change of a grade, already established as provided by law, and therefore the change of a legal grade.

The statutes cited in the opinion sufficiently indicate that it is the legislative policy of New York to award damages including interest for any change of grade effected pursuant to law, and that *grade* is a matter with which the law, in the interest of justice, concerns itself.

It is shown that Sec. 951 of the Greater New York Charter contains the term:

"in conformity with the grade established by lawful authority."

Can it be reasonably doubted, that in view of this provision in the Charter itself, which as a whole was the effective local law, governing the City and its authorities, a corporation contracting with the City, pursuant to provisions of the same Charter, for the use of its streets, and going so far as to enter into a contract modifying an existing contract, so as to insert a proviso respecting the regulating and grading of a street to be used, intended, and that the City also intended that the grading referred to was the

"grade established by lawful authority"

and not a mere arbitrary and temporary level! Since, as adjudicated in the *Crane* case (*supra*, p. 153) interest is allowable under the law of New York, upon damages due to a "change of grade" and from "the time of the change of grade," this is an illustration of the proposition that *grade* is an important factor in the beneficial enjoyment

of streets; and it is unreasonable to contend that a corporation contracting with a municipal corporation to construct a street railway only when a street is regulated and graded, intended to proceed whenever the street was level, or to forego the expectation that the grade should be first legally established, and then the level thereby ascertained completed, so that its own tracks should not thereby be arbitrarily moved to a new and permanent level so lawfully established. It was to avoid the physical change of grade which (as shown by the *Crane* case) is the basis of damages to abutting owners, that the Traction Company exacted the condition that it need not complete its surface railway until the streets should be "regulated and graded." To "grade" a street under the laws of New York, is not to scrape it to a plane surface, but to establish the physical surface at the level established by law.

The opinion in the *Crane* case recognizes in its exposition of the law, that

"substantial damage has been caused by actual changes."

Who can question that substantial damage will necessarily be caused to a street railway by changing the level of the surface along which it runs? And who can reasonably question that this obvious fact was the evil intended to be guarded against by the Traction Company in inserting the proviso, or that the evil was adequately covered by the words

"regulated and graded"?

In *Triest v. City of New York*, 193 N. Y. 525, it was said of Sec. 951 of the New York City Charter (*supra*, p. 151):

"It will be further observed that, under the provisions of this statute, a grade shall be deemed established by lawful authority where it was *originally* adopted by the action of the public authorities, or where the street or avenue has been used by the public as of right for twenty years and has been improved by the public authorities at the expense of the public, or of the abutting owners, and that all laws inconsistent herewith are hereby repealed."

In the last case cited it was determined that because the public authorities did not establish or fix a grade, and because it was not used as of right by the public for twenty years and had not been improved by the public authorities, at the expense of the public or of the abutting owners, according to the provisions of this statute, no grade had ever been established, and that the first grade ever "established" was that which changed the physical contour of the surface as it had previously been in use.

Section 439 of the New York City Charter (Ash's 4th Ed., p. 408) provided for the preparation of a map with profiles and the approval thereof by the Board of Estimate and Apportionment, and only then were grades to be deemed established and fixed. The affidavit of Frank B. Tucker, attached to the City's answer (pp. 101-103), shows that *this* grading had not been done.

In *People ex rel. City of Olean vs. Western New York and Pennsylvania Traction Co.*, 214 N. Y. 526, at 529 (decided April 13, 1915, shortly before the contract of January 21, 1916), it was said:

"The power to change the grade of a street may fairly be said to involve the power to compel a street railroad to lower or raise its tracks to conform to the new grade."

In this view can be found the substantial reason why the *proviso* of the contract of January 21, 1916, respecting regulating and grading the streets involved, before completion of the construction, is an important element in the contract, and is reasonably to be construed as contemplating the only regulating and grading known to the law of New York, the legal establishing of a fixed grade and the bringing of the street as a thoroughfare to that level.

And "regulated" too has a substantial significance; it was not *regulation* by the municipal authorities within the meaning of the proviso, to have the municipal authorities subject the Traction Company to forfeiture for non-completion by substituting for the cleaning of the obstructions from the streets involved, the opinion of its consulting engineer that though there are poles in the bed of the street and water hydrants and trees, and though in regulating streets it is the custom in New York City to move poles back to the curb line, nevertheless no poles need to be moved to allow of the construction, and the moving would cost approximately \$675. (Opinion, Circuit Court of Appeals, p. 148). The City of New York should have cleaned its own house before insisting on completion or forfeiture, and that was the fair meaning of the proviso.

BECAUSE, THEREFORE, OF THE FACTS BY THE CIRCUIT COURT OF APPEALS DEEMED ESTABLISHED (*supra*, p. 147), RESPECTING, NOT ONLY THE SEVEN PARCELS IN LAMBERTVILLE AVENUE, BUT ALSO THE TEMPORARY GRADE ON LAMBERTVILLE AVENUE BETWEEN FREEHOLD STREET AND MEDFORD STREET (*supra*, p. 67), THE CONDITION PRECEDENT FOR REQUIRING THE COMPLETION OF THE SURFACE RAILWAY BY THE TRACTION COMPANY HAD NEVER BEEN PER-

FORMED BY THE CITY, AND IT WAS NOT IN A POSITION TO ASSERT A FORFEITURE.

We have already by the diagram,—*supra*, p. 69,—and the discussion of facts—*supra*, p. 48 *et seq.*,—shown that for additional reasons the City was not in a position to assert a forfeiture.

The provisions of the modifying contract of January 21, 1916, which related (p. 71) to a temporary crossing of a railroad were in the nature of a concession to the Traction Company and permissive at its option; they did not supersede or modify the proviso that the streets should as a condition precedent to the ultimate extension of the surface railway be first “regulated and graded.”

The City's “title to the streets involved.”

The Circuit Court of Appeals has said (Opinion, p. 146):

“The reasons put forward for not having complied with the contract in the affidavit presented to the Court afford no excuse for the failure to perform. The parties to a contract are bound to perform it according to its terms, unless performance is rendered impossible by the act of God, by the law, or by the other party. Performance is not excused by unforeseen difficulties or because it has become unexpectedly burdensome. The times were hard, that the company was beset by financial difficulties, that labor and material had excessively advanced, and that it was impossible in a business sense to go ahead with the work may all have been reasons which might have been addressed to the City in appeal to have the time for the completion of the contract extended, but they afforded no legal excuse for the failure to perform.”

An inspection of the contract (pp. 37-38) will show that the City had driven an exceedingly hard bargain and that its penalties were severe. But by the modifying contract of January 21, 1916 (pp. 68-72), the hardship was somewhat mitigated by the insertion of the proviso (p. 70),

“that title to the streets involved has been vested in the City, and that said streets have been regulated and graded.”

While the hardship was “nominated in the bond,” the reciprocal condition was now exacted that at least

“title to the streets involved has been vested in the city.”

This condition did not allow of something “just as good,” or “substantially as good.” It spoke with precision and inclusively, the City’s title was to be as extensive as the Traction Company’s obligation. It is to be recalled that the Traction Company was then actually operating a railroad completed to the extent of its then existing immediate obligation; of its original undertaking a comparatively small portion remained to be completed; it had an existing terminus at Jamaica (p. 70); the remainder of the construction, which *could* not be immediately demanded by the City, extended from Jamaica to the City line (p. 70); by the modifying contract this *fourth* “portion” of the surface railway originally contracted for was divided into two sections, and a positive date was fixed for the completion of the first section, but the completion of the second section (now the *fifth* “portion”) was still left indeterminate (p. 70); and with respect to this the Traction Company exacted the condition precedent that “title to the streets involved has been vested in the

City." This is not a case where the maxim "*de minimis non curat lex*" applies. In respect to this small remaining portion of the road, complete fulfillment of the condition precedent had been agreed on by the parties before the obligation of the Traction Company should arise. Now, what was the fact?

The Receiver's petition (Par. XIII, p. 10; XXXI, p. 17) represented that

"title to all of the streets involved in said extension has not been vested in the City."

It also represented (Pars. IX-X, p. 9) that at the time of the adoption of the resolution requiring the Traction Company to begin and complete work such title had not so vested.

It will thus be noted that whether or not title had vested at the date of the answer it is alleged that it had not so vested when the resolution of demand was adopted, and that therefore the right to make the demand was not then accrued.

The actual facts are shown—*supra*, p. 48 *et seq.* and diagram, *supra*, p. 69.

The Circuit Court of Appeals says (Opinion pp. 147, 148; 266 Fed. R., p. 638):

"We think, too, that it plainly appears that the title to the streets, *except the crossing of the Long Island Railroad*, is in the City;

and as to that we have seen that there is no obstacle in the way of the construction of the trolley line by a trestle above."

When the proviso was framed it did not

"except the crossing of the Long Island Railroad."

Why should the Circuit Court of Appeals permit the City to except it, simply because

"there is no obstacle in the way of the construction of the trolley line by a trestle above"?

The City can not offer a substitute and then declare a forfeiture for not accepting the substitute.

The original contract (p. 38) provided for a "street surface railway," though it provided (p. 39) for a certain part of the railway through private property; it did not specify the ownership by the City of the streets named; it provided specifically (p. 39) for a

"single track *in* and *upon* Central Avenue and crossing the Montauk Division of the Long Island Railroad."

The Contract (p. 39) referred to a map, commonly known as the Jamaica map, "showing the street system and grades," * * * "crossing *under* the tracks of the Long Island Railroad to Lambertville Avenue"; the route was described (p. 39) "as lying *within* certain *streets* as shown" upon the said map.

The Receivers' petition alleged (p. 10, par. XIII)

"that title to the right-of-way of the Long Island Railroad Company, upon which are its tracks, and which crosses Lambertville Avenue at the grade thereof near Carlisle Street, is not vested in the City; that said right-of-way is fenced in on each side where it crosses Lambertville Avenue, and Lambertville Avenue is not physically open across said right-of-way for vehicular traffic, and that said Lambertville Avenue is not graded to its proper legal grade at this point, but only to a temporary grade;"

and further :

“and that title to the right-of-way of the Long Island Railroad, where its tracks cross Westchester Avenue (Central Avenue) at grade, near Montauk Avenue, in the Borough of Queens, is not vested in the City of New York.”

(p. 11, par. XIV) that Central Avenue was vested in the City only

“to the travelled roadway and not to the full legal width of the street, or even in the travelled roadway between Springfield Road and the City line, and that a portion of Westchester Avenue occupied by the right-of-way of the Long Island tracks, near Montauk Avenue, is not vested in the City.”

The contract (pp. 39, 40) referred to the map above mentioned as showing the street system and grades, and specified (p. 40)

“Westchester Avenue from Ulster Street to the line dividing the City of New York from the County of Nassau.”

Therefore by the original contract the route was to cross under the tracks of the Long Island Railroad to Lambertsville Avenue and to lie *within* Westchester Avenue at the respective points in controversy.

The modifying contract of January 21, 1916 (p. 69), which inserted the *proviso* as to title, by its section 2 (p. 71), changed the former provisions of Paragraph Eighth, section 3 (p. 45), so as to permit the crossing of a certain freight side-track at grade, but otherwise it continued the former provisions against crossing railroads at grade, and *permitting* a temporary crossing either on private property or “within the lines of such

streets or avenues to be determined by resolution of the Board" (p. 70). It also provided

"When such grade shall have been changed and a permanent crossing shall have been constructed to carry such street or avenue either above or below the grade of such railway or railroad, then the Company shall, upon the order of the Board, abandon the above described temporary crossing, and construct its tracks upon such permanent structure as shall be directed by the Board. Any property acquired in fee by the Company for the purpose of the temporary crossing hereinbefore provided for shall be ceded to the City without compensation therefor by the Company when the same is required by the City for widening such street or avenue upon the removal of the tracks of the Company from such temporary crossing and approaches thereto, to the permanent crossing structure."

From a careful consideration of this clause, several things are apparent, the Traction Company was not to cross a railroad at grade, it was *permitted* but *not* required to erect a temporary crossing; if it did so, it was to be at its own expense; it was to part, without compensation, with any private property which it acquired at its own expense, which might be needed by the City to widen "such street or avenue," the Board was to designate lines within streets where a temporary crossing might be erected, if erected within streets and avenues,

and the *proviso* in Paragraph Seventh (p. 70) did *not* make any exception, to enable the City to *coerce* the Traction Company to erect the temporary crossing, if the City had not acquired title to that part of a street involved which crossed a railroad right of way.

THEREFORE, we urge, it was no excuse to the City and no basis for a resolution or act of forfeiture that notwithstanding the fact that it had not acquired title to the street across the railroad right of way, (in the language of the Circuit Court of Appeals,—Opinion, p. 148; 266 Fed. 638).

“there is no obstacle in the way of the construction of a trolley line by a trestle above.”

It is not a question of obstacle in the way of a trestle, but of contract right that the City is in no position to forfeit until it has acquired title to the bed of the street across the railroad right of way; then, and then only under “the nomination of the bond” can the City enforce the hardship which it exacted.

In this aspect of legal right, the allegations of hardship take on a different light from that ascribed to them by the Circuit Court of Appeals; they are not a plea for mercy which can not be granted, but are an excuse by the Receivers for not resorting to the alternative which, under Paragraph Eighth, was optional to them, but which did not enhance the rights of the City, or enable it to declare a forfeiture.

There is no dispute of the fact, that the City had not acquired title to the bed of Lambertville Avenue at the railroad crossing; that Lambertville Avenue was not physically open for vehicular traffic across the railroad and was graded only to a temporary grade, is apparent from the City’s answer to the petition (Par. Ninth, p. 88).

The City’s attempt in its answer (p. 90) to qualify and explain the meaning of “streets involved” in the proviso, as meaning only the streets already owned by the City, results in a manifest absurdity; the proviso could not possibly

have intended that title to the streets already owned, should vest; it spoke prospectively.

The answer (p. 91) shows that title does not vest except by street opening proceedings, delivery of deed or dedication and acceptance; there is no sound reason for restricting the meaning of "streets involved" to the roadway necessary to the construction of the railway. Passengers are a reasonable expectation of a railway, and sidewalks contribute to its realization; the sidewalks are as essential to a street as its roadway; and by the confession of the answer, under a standing rule of the Board since 1909, a "street" 75 feet wide, consists of a 40-foot roadway, and two 17½-ft. sidewalks; but the "street" is designated as an entirety. The *proviso* did not specify a part of a street, but "street."

We therefore submit, that

IT IS DEMONSTRATED THAT BECAUSE THE CONDITIONS PRESCRIBED IN THE PROVISIO HAD NOT BEEN MET BY THE CITY, IT WAS IN NO POSITION LEGALLY TO DECLARE A FORFEITURE.

D.

Equity should relieve the Receivers.

This should be regarded at least as a suit to restrain the persons enjoined, including the City officials, members of the Board, from an illegal act under color of their office which will cast a cloud on the property of which the Receivers are in possession and which they are operating, and as such within the jurisdiction of equity.

Lane vs. Watts, 234 U. S. 525, 540.

An unwarranted act of a public official may be enjoined.

Santa Fe Pacific R. R. vs. Lane, Secretary of the Interior, 244 U. S. 492.

Home Telephone, &c., Co. vs. City of Los Angeles, 227 U. S. 278.

The Receivers were not required to await the unlawful action of the Board and adopt the "hazardous and embarrassing course of ignoring it."

Santa Fe, &c., R. R. vs. Lane, 244 U. S. at p. 498.

The power which the Court was asked to exercise was the power to protect the property in its custody from invasion; a power which it might lawfully exercise even though the ordinary grounds for the interposition of equity had not been set up (as they were).

In Re Tyler, 149 U. S. 164, 181.

It was the *duty* of the Court to see that the claims of the City should be determined in the orderly administration of justice under the sanction of the Court.

Ibid., p. 183.

It was the Receiver's right and duty to refer those who would interfere with the property (including the franchises) to the Court.

Ibid., p. 185.

In the last cited case (at p. 186), Chief Justice Fuller in his opinion approved the view of Drummond, J., in *Western Union Telegraph Co. vs. Atl. & Pac. Tel. Co.*, 7 Bissell, 367, that property in custody of a federal court could not be condemned in

the exercise of *eminent domain*, without the consent of the federal court first obtained; and he also approved the suggestion of Mr. Justice Matthews in *Covell vs. Hegman*, 111 U. S. 176, 182, that property in the custody of the federal court is within a different territorial sovereignty from the State; and that State process in such case is no better than foreign process.

In this view, although rights may be administered in accordance with applicable law in the Federal Court, and this law may be State law, nevertheless a Board of municipal officers, though operating under claim of a State law, should no more be permitted to effect the forfeiture of a franchise being operated by the Court without its leave, than a State Sheriff (in the case cited) was permitted to levy a State Court's writ of execution against property in the custody of the Federal Court's receiver.

Under the theory approved in *In re Tyler*, 149 U. S. at p. 186, this franchise as well as the tangible and visible property, was withdrawn from the reach of the City officials, as though withdrawn physically beyond the territorial limits. And the proper course is pointed out (p. 187), the City should have intervened *pro interesse suo*, and have sought the judgment or leave of the Court. And in such case (p. 187), the Court is empowered to determine the validity and extent of the City's claim.

The proposed action of the Board was tantamount to a determination to seize property in the custody of the Court (*ibid.*, pp. 188, 190); the Board could not lawfully (*ibid.*, p. 191) interfere with the operation of the railway, nor interfere in any way with the custody and operation by the Court's Receivers, without its leave.

In re Swan, 150 U. S. 637.

The distinction between a penalty in a law and a penalty in a contract was pointed out by Chief Justice Taney in *State of Maryland v. Baltimore & Ohio R. R. Co.*, 3 How (U. S.) 534, at pp. 549 *et seq.* and it is there pointed out that a State can release a penalty in favor of County Commissioners, which it could not by legislative act, constitutionally release, if secured to the same Board by contract. We have already shown (*supra*, p. 134) that the Legislature of New York, by section 72, of the City Charter, gave the City the option to make a grant by ordinance, resolution, or contract; and it chose, in the present instance, to adopt the contract method. Having utilized the power to make a contract, it can not now be urged rationally, that it escaped the results of its choice, or that its contract rights are not to be treated as such; for the enforcement of these it should be subjected to the power of the Court which is operating under the franchise through its Receivers.

The limitations upon the power of federal Courts to enjoin State officers and agents are enumerated in

Belknap v. Schied, 161 U. S. 10, at p. 18.

None of these limitations apply to the present case.

Where the State can not be made a party, because of its immunity from suit, its agents can be enjoined from doing an unlawful act, though in its name.

Osborn v. U. S. Bank, 9 Wheaton 738, 838.

An injunction will lie in a federal equity Court to prevent a threatened unlawful action by a State officer to deprive a corporation of its chartered

privileges, or the total destruction of its franchise.

Ibid, p. 840.

Such injunction is granted

“to prevent a permanent injury from being done to the party entitled to the franchise or privilege” (*Ibid*, p. 841).

Further illustration of the issue of such or similar injunctions are:

Board of Liquidation v. McComb, 92 U. S. 53;

Allen v. Baltimore and Ohio R. R. Co., 114 U. S. 311;

Pennoyer v. McConnaughy, 140 U. S. 1.

Even a State law, which constitutes a contract, can not be repealed without mutual consent.

Poindexter v. Greenhow, 114 U. S. 270.

What the State of New York could not constitutionally do, of course its creature or agent could not lawfully do. Neither of them could constitutionally by an act of repealer, affect the franchise unjuriously by revoking it, except in accordance with its terms and after the fulfilment by the City of its conditions precedent.

See

Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453.

The last cited case illustrates the propriety of the injunction granted by the District Court in this case, in anticipation of the threatened injury.

The opinion of the Circuit Court of Appeals (Opinion, p. 144; 266 Fed. R. 635) announced the

general rule that a court of equity will not enjoin the exercise of governmental or legislative power by a municipal corporation even though its action should be unconstitutional; (citing *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471).

But we distinguish this present case, as already indicated (*supra*, p. 117 *et seq.*), *not*, as intimated by the Circuit Court of Appeals (Opinion, p. 145, 266 Fed. R. 636), because of any distinction between an ordinance and a resolution (though there may be such distinction, because the Board of Aldermen is the ordinance making and legislative branch of the City government—N. Y. Charter, sec. 38, 39, 43), but because the power to revoke the franchise or forfeit the property was never conferred as a legislative power, upon any functionary of the City; it was strictly a contract right (*supra*, p. 117 *et seq.*) derived from and defined by the contract; and a right so reserved and defined and arising from the contract is not a legislative power, though exercised by a municipal corporation or any of its Boards.

The injunction granted in this case was in harmony with the general principle stated in

Erhardt v. Board, 113 U. S. 537.

The distinction between an ordinance which is the exercise of a legislative power, and even an ordinance which is not mere legislation, and is therefore not beyond the injunctive interference of a court of equity to prevent as an unauthorized action of municipal authorities, is illustrated by the following cases in which injunctions were granted:

In *Poppleton v. Moores*, 62 Nebraska 351, an injunction was granted to prevent the passage of an ordinance extending a franchise.

And in *North Jersey Street Railway Co. v. South Orange*, 58 New Jersey Eq. 83, *Pitney, V. C.*, held that the adoption of an ordinance forfeiting the franchise of a street railway company, is not a legislative act, and that such ordinances are not legislative in character; he held such an ordinance ascertaining facts to be in effect a judicial proceeding and decree; and that a court of equity had the same right to interfere as it had with an action at law; he considered that if the railway company proceeded with due diligence the object of the forfeiture clause would be accomplished; and he granted an injunction *pendente lite* as was done in our case.

The cases are collated in a note 19 *Am. & Eng. Annotated Cases*, pp. 208-212, and the qualifications of the rule followed by the Circuit Court of Appeals are shown.

Whatever may be the general rules of law, the fact is that in *New York*, such activity of a municipal corporation has been authoritatively determined *not* to be a legislative act, and not to be free from the injunctive power of a court of equity.

Negus v. Brooklyn, 62 How. Pr. (N. Y.) 291.

People v. Sturtevant, 9 N. Y. 263; 59 *Am. Dec.* 536.

People v. Dwyer, 90 N. Y. 402.

Milhau v. Sharp, 15 Barb. (N. Y.) 193.

To the same effect see *State ex rel. Abel v. Gates* (Missouri Supreme Court), 2 L. R. A. (N. S.) 152 & note.

In *People ex rel. Negus v. Dwyer*, 90 N. Y. at p. 409, it was said:

“Whether the act sought to be enjoined was or was not of a legislative character was a

judicial question, to be disposed of by the Court, acting upon the facts, and it could prohibit action" (a municipal ordinance) "until it could investigate and finally decide the question" (*People v. Sturtevant*, 9 N. Y. 274).

In *People v. Sturtevant*, 9 N. Y. 274, at p. 273, it was said that the grant of a franchise by resolution upon condition is *not* an act of municipal legislation, and the jurisdiction of the courts can not be defeated by giving it the *form* of an ordinance or resolution; and that a corporate body may be enjoined from making a grant; and that even legislative act by a municipal body may be arrested until the Court determines judicially whether it is legislative.

The District Court had power to restrain the appellee from carrying out its threatened action of taking possession of the property of the Traction Corporation without action at law or in equity and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States; such power was properly exercised to prevent irreparable injury.

In this connection we recapitulate some of the facts to show the sequence of events.

On October 19, 1917, the appellee adopted a resolution whereby the Traction Corporation was called upon to show cause, on November 9, 1917, why a resolution declaring forfeited its franchise "should not be adopted, and why such resolution shall not provide that the railway constructed and in use by virtue of said contracts shall thereupon become the property of The City of New York without proceedings at law or in equity" (Transcript, p. 36).

The appellee, through its proper officials, prepared in advance of hearing and in anticipation of its action a proposed resolution of forfeiture (Transcript, pp. 33-37), the adoption of which was prevented by the injunction in question. The proposed resolution of forfeiture determines as a fact that the Traction Corporation has breached the provisions of the grant as amended, and that the grant for such cause should be forfeited and the railway constructed and in use by virtue of the grant should become the property of the appellee, and then proceeds to declare the grant forfeited to the appellee, and further declares that the railway constructed and in use by virtue of the grant "shall from and after this date become the property of The City of New York without proceedings at law or in equity" (Transcript, p. 37).

The petition of the appellants alleges that the appellee by said resolution "threatens to forfeit the said franchises of the Traction Corporation and to take all of its railway constructed and in use, without any compensation whatever to the Traction Corporation and without any proceedings at law or in equity" (Transcript, p. 14). The answer of the appellee admits this allegation (Transcript, p. 88).

The situation thus presented is that the appellee has already adopted one resolution calling upon the Traction Corporation to show cause why its grant and railway should not be forfeited to The City of New York. It has prepared in advance of the hearing a resolution of forfeiture of both the grant and the property, wherein it proposes not only to forfeit the grant but to take possession of the property of the railway forthwith. The proposed action, therefore, is two-fold: (1) to declare a forfeiture; (2) to take into its own possession the property of the railway without pro-

ceedings at law or in equity and without compensation. The petition of the appellants shows that the appellee has itself not performed the condition which gives it the right to compel the extension of the road, for failure to make which the appellee claims the right to forfeit and to take to itself the property of the Traction Corporation, that the appellee admits it will take the property of the Traction Corporation, without action at law or in equity and without compensation, that such threatened action is in violation of the Fourteenth Amendment to the Constitution of the United States, and that the threatened action will be taken if not enjoined and will work irreparable injury to the petitioners.

That such action, upon the facts alleged, if taken, would deprive appellants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution is not open to controversy.

No one questions that an agent of the state, acting under color of authority or in pursuance of claimed power, when in so acting deprives another of any right protected by that constitutional amendment, violates the prohibition therein contained.

Ex parte Virginia, 100 U. S. 339;
Pacific R. Co. v. Nebraska, 164 U. S. 403;
Smyth v. Ames, 169 U. S. 466;
Reagan v. Trust Co., 154 U. S. 362;
Raymond v. Chicago Traction Co., 207 U. S. 20;
Ex parte Young, 209 U. S. 123;
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278.

The appellee claims, and the Circuit Court of Appeals holds, that granted all that is stated is

true, still the District Court is without power to issue its injunction until the appellee has actually done the threatened act, irrespective of the fact that the threatened act "may be in disregard of constitutional restraints and may impair the obligation of contract" (Transcript, p. 144).

The ground of such contention of the appellee and the conclusion of the Circuit Court of Appeals is that a court of equity is powerless to issue an injunction to restrain a municipal corporation from the exercise of "legislative or governmental power."

There appears to be no authority for the proposition that a governmental act cannot be enjoined where the facts show that the threatened action is imminent, and, if not enjoined, will result in the taking of property without due process and in irreparable injury.

To hold otherwise would be to deprive a court of equity of the exercise of one of its well recognized powers.

As was said in *Vicksburg Water Co. v. Vicksburg*, 185 U. S. 65, 82:

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in pro-

protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In *Iron Mountain R. Co. v. City of Memphis* (Circuit Court of Appeals, Sixth Circuit), 96 Fed. 113, the grant of the right to use of certain streets in the City of Memphis provided that the railroad should not discriminate in rates against said City. The City, claiming a discrimination, passed a resolution to the effect that if such discrimination did not cease within a certain number of days the grant would be forfeited. Upon the adoption of such resolution the railroad filed a bill to enjoin action thereunder, and to have the same declared void. The Court, in sustaining the right of injunction against the threatened action of the City, states, at page 125, in part, as follows:

"With respect to the occupancy of a street, however, which it controls by virtue of its being an agent of the state, and a trustee for the public, its action in depriving persons having vested property rights in the street will, if without due process of law, be state action, within the inhibition of the fourteenth amendment. For our present purpose, it is not important whether this threatened taking possession of a street under a resolution by force is to be regarded as legislative or executive action, for either as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law. What has been said necessarily leads to the conclusion that the Court below was right in sustaining its jurisdiction on the ground that the action of the city taken and contemplated would constitute a violation of the fourteenth amendment and might be prevented by injunction."

* . . . *

"The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate."

* * * * *

"It is argued that the resolution was in exact accord with the stipulation of the parties, and in the language of the condition itself contained in the contract by which the railroad company entered upon the occupancy of the street. It is contended that it left to the city the right to declare such forfeiture at its option, and upon the declaration of such forfeiture to resume possession of the street. The language of the conditions of the contract and of the forfeiture clause are like an ordinary condition subsequent in any lease or deed conveying an estate. Such forfeiture clauses always provide that upon the breach of the condition the lessor or the grantor may re-enter upon the premises, and have the same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might lawfully by force and arms repossess himself of the estate, after a breach of the condition, if such repossession were resisted by the lessee or grantee."

* * * * *

In *Knickerbocker Trust Co. v. City of Kalama-*
zoo, 182 Fed. 865, 869, the Court, treating of its power to enjoin the adoption of a threatened resolution of forfeiture by a municipality, states, in part, as follows:

"I do not see why it should always be necessary to wait until the law has been passed before resorting to equity. It is elementary that an injunction will be granted to prevent injury which is only threatened where that

injury will, if injurious act is allowed to be committed, be irreparable; * * *. In the case of a street railway franchise, it is apparent that the mere passage of a revoking or forfeiting ordinance or resolution would produce a great injury, even before any attempt was made to prevent the operation of cars because, among other reasons, it would create a cloud upon the title of the property, would raise doubts as to the right to demand fares, would make innumerable controversies and generally would create a public belief that the railway company had no right in the street."

Likewise, in *Leverich v. Mayor, etc., of Mobile*, 110 Fed. 170, the municipality threatened to adopt an ordinance which the bill of complaint alleged would be a serious invasion of rights of property. The Court held it was not necessary "that the ordinance should be adopted to entitle the parties to the remedial and preventive jurisdiction of the Court."

Appellee relies upon the case of *New Orleans Waterworks v. New Orleans*, 164 U. S. 471, as an authority to sustain its contention that a court of equity is without power to enjoin in advance a legislative or governmental act, even though the same results in the impairment of constitutional restraints.

In that case, on the point under consideration, the adoption of a resolution was not even threatened, and there was no threatened and imminent taking of property without due process, resulting in irreparable injury. The decision of the Court was proper in that case. But here what was contemplated was the passage of an ordinance declaring forfeiture of the grant, and to take the property of the Traction Corporation without pro-

ceedings at law or in equity and without compensation, which allegations in the petition of the appellants is admitted by the appellee. The appellee was preparing to take possession of the railway, which the proposed resolution declared "from and after this date shall become the property of The City of New York without proceedings at law or in equity." As the appellants were in possession of the property, and as the appellee proposed to take said property without action at law or equity, or without compensation, it follows that the same could only be done by forcible entry. Such action would be without due process, and can always be enjoined.

The cases cited for the proposition that a court of equity cannot enjoin a legislative act were not cases where the state agency admits, that unless enjoined, it will take property without due process of law, to the irreparable injury of complainant.

That irreparable injury would result to appellants from the carrying out of such threatened action, is plainly evident. Such a declaration of forfeiture alone upon the public record not only would be a cloud upon the title to the property itself, but would preclude the possibility of financing the property or redeeming it from the receivership, and would result in all kinds of controversies with the traveling public and public officials and otherwise, without the benefit of determination in proper judicial proceedings.

III.

This Court should reverse the Circuit Court of Appeals, and reinstate the order of the District Court,

either for lack of jurisdiction (Point I, *supra*, pp. 27-44),
or upon the merits (Point II, *supra*, pp. 44-180).

Respectfully submitted,

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Office Supreme Court

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 5.

GAS AND ELECTRIC SECURITIES COMPANY,
Plaintiff,

against

MANHATTAN AND QUEENS TRACTION COR-
PORATION,
Defendant.

*In the Matter
of*

The petition of WILLIAM R. BEGG and ARTHUR
HUME, Receivers of Defendant, *Appellants,*

Relative to the Franchise and Property of the Defen-
dant.

THE BOARD OF ESTIMATE AND APPORTION-
MENT of The City of New York, the members thereof
and The City of New York, *Appellees.*

BRIEF ON BEHALF OF THE APPELLEES.

JOHN P. O'BRIEN,
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New York.

VINCENT VICTORY,
Solicitor for Appellees.

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Map showing the franchise route of the Manhattan and Queens Traction Corporation, including the right to operate over the City-owned tracks and with the City-owned equipment on the Queensborough Bridge 217

[18646]

Supreme Court of the United States

OCTOBER TERM, 1922.

GAS AND ELECTRIC SECURITIES COM-
PANY,

Plaintiff,

against

MANHATTAN AND QUEENS TRACTION
CORPORATION,

Defendant.

In the Matter

of

The Petition of William R. BEGG and
Arthur Carter Hume, Receivers
of Defendant, *Appellants,*

Relative to the Franchise and Prop-
erty of the Defendant.

THE BOARD OF ESTIMATE AND AP-
PORTIONMENT of The City of New
York, the members thereof, and The
City of New York, *Appellees.*

Decision in Court of Appeals, 266 Fed. Rep., 625;
Decision in District Court,—Fed. Rep.,—

**BRIEF ON BEHALF OF THE BOARD OF ESTI-
MATE AND APPORTIONMENT OF THE CITY OF
NEW YORK, THE MEMBERS THEREOF, AND THE
CITY OF NEW YORK.**

[NOTE: Throughout this brief and appendices all italics
are ours. References to pages are to the transcript
of the record and "page hereof" means the paging
of this brief.]

The word "Board" means The Board of Estimate and Apportionment of The City of New York. The "Corporation" means The Manhattan and Queens Traction Corporation.

This is an appeal by the Receivers of the Manhattan and Queens Traction Corporation from a decree (p. 150) filed March 4, 1920, reversing a final order (p. 121) entered August 24, 1918, granting the motion of the Receivers for a permanent injunction "*without prejudice to any further or other application to this Court for the enforcement of any claim or right of The City of New York, as to said matters*", and further decreeing "*that the temporary injunction, granted December 19, 1917, be made permanent pending further order in the action.*"

This final order restrained John F. Hylan, Mayor of the City of New York, and Chairman of the Board of Estimate and Apportionment of the City of New York, and other members of said Board, to wit, the Comptroller, President of the Board of Aldermen and the five Borough Presidents as members of said Board, together with said Board of Estimate and Apportionment of said city "*as a body*" and "*each of them*":

"from moving, considering, voting on, amending, adopting or in any manner passing a resolution of any kind or in any form whatsoever, declaring forfeited, forfeiting or purporting to forfeit, impairing and or affecting the franchise contract of the Manhattan and Queens Traction Corporation, dated October 29th, 1912, and the amendments thereof, dated respectively July 21st, 1913, and January 21st, 1916, and or the franchises, rights and privileges of the Manhattan and Queens Traction Corporation to operate a street surface electric railway upon its route in the City of New York, upon the grounds of action herein set forth and from (until further order of this Court) declaring forfeited, forfeiting or purporting to

forfeit, and or to take or otherwise interfere with the railway, equipment property and assets of the Manhattan and Queens Traction Corporation now in the hands of the receivers of this Court, and or declaring the same, or purporting to declare the same, in any manner or form, the property of The City of New York, and from (until further order of this Court), *taking any action or step, whatsoever, covered, contemplated, or threatened by the notice and resolution purported to have been adopted by the said Board of Estimate and Apportionment at its meeting on October 19, 1917, copy of which, marked "E", is annexed to the petition of the said receivers, dated December 19, 1917, and from calling the roll of the Board of Estimate and Apportionment, on said motion, or acting upon such a resolution in any form, and from doing (unless after application to this Court) any act or acts, thing or things, and from taking any steps whatsoever looking to, purporting to, or for the purpose of, or preliminary to a forfeiture of; the taking of or the interfering with in any manner, directly or indirectly, said franchise of the Manhattan and Queens Traction Corporation and or its amendments, or any one of them, and of the franchises, rights, property and assets of the said Traction Corporation now in the hands of the receivers of this Court, and from (unless after order of this Court) taking, declaring forfeited or purporting to forfeit any of the property assets or bond or bonds of the said Manhattan and Queens Traction Corporation now on deposit with the City of New York, and from (unless after order of this Court) collecting or deducting any penalty forfeiture or damages, whether liquidated fixed or otherwise from said corporation or its property and from (unless after order of this court) taking any step or steps, doing any act or acts whatsoever, for the purpose of depriving or preventing the Manhattan and Queens Traction Corporation and the receivers of this Court from ex-*

ercising the franchises of the said corporation or from controlling and operating its railway in the streets of the City of New York, and from in any manner, directly or indirectly, interfering with the receivers of this Court in their administration of the franchises, rights, assets and property of the Manhattan and Queens Traction Corporation now in their control and possession, except from taking steps to review or modify this order in the premises."

This was all made permanent "pending further order in the action."

The following is the resolution of the Board of Estimate and Apportionment of the City of New York mentioned in this order as being adopted on *October 19, 1917*:

"RESOLVED, That the Manhattan and Queens Traction Corporation be and it is hereby notified, under and pursuant to Section 5, Thirteenth, of the contract dated October 29, 1912, by and between The City of New York and the South Shore Traction Company, which said contract was, with the consent of the Board of Estimate and Apportionment given by resolution adopted November 21, 1912, and approved by the Mayor November 22, 1912, assigned to the Manhattan and Queens Traction Corporation, to appear before the Board of Estimate and Apportionment on November 9, 1917, at a meeting of said Board to be held on said date, at 10:30 o'clock A. M., in Room 16, City Hall, Borough of Manhattan, and show cause why a resolution declaring forfeited the contract dated October 29, 1912, granting a franchise to the South Shore Traction Company and subsequently assigned to the Manhattan and Queens Traction Corporation, and the contracts dated July 21, 1913, and January 21, 1916, by and between The City of New York and the Manhattan and Queens Traction Corporation, amending said contract dated October 29, 1912, should not be adopted, and

why such resolution shall not provide that the railway constructed and in use by virtue of said contracts shall thereupon become the property of The City of New York without proceedings at law or in equity; and be it further

RESOLVED, That the Secretary of this Board be and he hereby is directed to forward to the Manhattan and Queens Traction Corporation copies of these resolutions and notify said Corporation, in writing, that on the aforementioned date, at said time and place, said Corporation will be allowed a hearing before final action is taken." (p. 28).

Paragraph "Thirteenth" of Section 5 of the franchise of October 29, 1912, under the provisions of which the above mentioned resolution was passed, appears on page 54 of the transcript and reads:

"Thirteenth—In case of any violation or breach or failure to comply with any of the provisions herein contained, this contract may be forfeited by a suit brought by the Corporation Counsel on notice of ten (10) days to the Company, or at option of the Board by resolution of said Board, which said resolution may contain a provision to the effect that the railway constructed and in use by virtue of this contract shall thereupon become the property of the City without proceedings at law or in equity. Provided, however, that such action by the Board shall not be taken until the Board shall give notice to the Company to appear before it on a certain day, not less than ten (10) days after the date of such notice, to show cause why such resolution declaring the contract forfeited should not be adopted. In case the Company fails to appear, action may be taken by the Board forthwith." (p. 54).

FACTS**Old Franchise of May 20, 1909.**

About May 20, 1909, The City of New York granted by resolution a street surface railroad franchise to the South Shore Traction Company for the construction of a street surface railway along substantially the same route as is mentioned in the later contract of October 29, 1912. About December 30, 1910, Receivers were appointed for this company which and who failed to construct the railway. These receivers, claiming to have interested certain capitalists in the construction of this railway, petitioned the Board of Estimate and Apportionment of the City of New York on May 2, 1912, to have this franchise amended in certain particulars so that the same would be acceptable to these capitalists, and as a result it was agreed between these Receivers and the Board that it was to the interest of both parties to have the old contract of May 20, 1909, and its amendments rescinded and a new contract granted to the said South Shore Traction Company which could be thereafter assigned to these capitalists who had organized the Manhattan & Queens Traction Corporation to take over such railway.

New Contract of October 29, 1912.

On July 15, 1912, in accordance with the provisions of Section 74 of the Greater New York Charter as amended (p. 196 hereof) the Board of Estimate and Apportionment of the City of New York adopted a resolution granting a franchise in the form of a contract to the South Shore Traction Company (bottom of page 37; petition, paragraph II, p. 7) and directing the Mayor to execute and deliver same to this corporation

(Petition, paragraph II, p. 7). This resolution and the vote thereon is, with the exception that the form of contract is left out, as follows:

RESOLVED, That the Board of Estimate and Apportionment hereby grants to the South Shore Traction Company the franchise or right fully set out and described in the following form of proposed contract for the grant thereof, embodying all of the terms and conditions, including the provisions as to rates, fares and charges, upon and subject to the terms and conditions in said proposed form of contract contained, *and that the Mayor of The City of New York be and he hereby is authorized to execute and deliver such contract in the name and on behalf of The City of New York, as follows, to wit:*

(Here follows proposed form of contract, which is identical in form and substance with the contract of October 29, 1912 printed on pages 37 to 60 of Transcript, except that it was unexecuted.)

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, the Presidents of the Boroughs of Manhattan and Brooklyn, the Acting President of the Borough of The Bronx, and the Presidents of the Boroughs of Queens and Richmond—16." (p. 173 hereof).

In pursuance of this resolution on October 29, 1912, the contract (pp. 37-60), properly executed, was delivered to the South Shore Traction Company and accepted by it. On November 21, 1912, the Board adopted a second resolution on the petition of these Receivers approving of the assignment of this franchise to the Manhattan and Queens Traction Corporation.

On December 3, 1912, the Public Service Commission of the State of New York issued this company a

certificate of convenience and necessity (Petition, paragraph II, p. 7; fol. 13).

The route of this corporation named in its franchise was at its request slightly altered by the Board by an agreement dated July 21, 1913, which change is of no importance in the consideration of this case. This franchise contract of October 29, 1912, was also changed as *to the time of construction and operation and the manner of crossing certain railway tracks*, in and by an agreement dated *January 21, 1916*. This change is most important.

The streets and avenues along which this franchise was granted are described at pages 38, 39 and 40 (the amendment appearing at p. 63) and these routes are also described in maps at pages 180 and 181, and amended route on page 182. These routes are described as follows:

“; * * * thence by double track in and upon Rockaway Turnpike to Pacific Street, thence by double track in and upon Pacific Street to and across Brooklyn Avenue; thence by double track in and upon private property approximately in line with Pacific Street if the same were extended, to Vine Street; thence by double track in and upon Vine Street to State Street thence by double track in and upon State Street to Woodland Avenue; thence by double track in and upon Woodland Avenue to private property; *thence by double track in and upon private property* approximately on a line with the Woodland Avenue if the same were extended, to a point approximately in line with Central Avenue if the same were extended; *thence by double track in and upon private property* approximately on a line with Central Avenue if the same were extended, to Merrick Road; thence by *single track* across Merrick Road to Central Avenue; thence by *single track* in and upon Cenrtal Avenue and

crossing the Montauk Division of the Long Island Railroad to a point where Central Avenue intersects the boundary line between the City of New York and the County of Nassau. * * * (p. 39).

The names of the streets mentioned in the quotation *have since been changed* as follows:

Rockaway Turnpike	to Sutphin Road,
Pacific Street	to Lambertville Avenue,
Brooklyn Avenue	to Belleville Avenue,
Vine Street	to Spangler Street,
State Street	to Brinkerhoff Avenue,
Woodland Avenue	to Smith Street,
Private property changed	to Ulster Avenue and
Smith Street in part.	
Central Avenue	to Westchester Avenue
	17th Avenue
	Dearborn Avenue

The contract of October 29, 1912, provides that all *these described routes are shown upon two maps* dated May 2, 1912, attached to the contract and that these maps are to be deemed part of the contract and to be constructed with the text thereof and are to be substantially followed. (Maps 1 and 2 pp. 181 and 182).

These maps show old Central Avenue from Merrick Road to City Line as a street 50 feet wide.

Explanation of City Maps, Tentative and Final.

The map of *January 11, 1912*, called the "Jamaica map" mentioned in the contract of October 29, 1912—(four lines from the bottom of the page 39), shows the lines of both the existing and *proposed streets* (*the existing streets* are shown by very small dotted lines or dots and the *proposed streets* are heavy lines). It will be noted, however, that the route of the railway is de-

scribed over and along the *existing* streets. The reason for this is that the map of January 11, 1912, was merely what is called a "*tentative*" map—not having been signed by the *secretary of the Board* and *filed* in the three offices mentioned in Section 439 of the Greater New York Charter (page 215 hereof). It was not therefor a *final* map as defined in this section of the Charter. This map does not show *final street grades, angles or lineal distances between blocks*. This map is designed solely to show the proposed layout of this locality. (A copy of the "Jamaica map" is hereto attached as appendix 5).

Before the City can take property for a street use the Board must make a *final map* of the street, showing *street lines, grades, angles and lineal distances*. The property to be taken for the street use is described by metes and bounds in the resolution of the Board directing the taking, from which description a *rule map* is made and also damage maps.

The part of the Company's route (from Farmers Avenue to the City line) lies through the Hollis section of Queens County for which a tentative map, called the "*Hollis Map*" was adopted by the Board *May 29, 1913*. From this fact it is clear that 117th and Dearborn Avenues were not even paper strtets on October 29th, 1912 when the contract was executd. (This map is also attached hereto as appendix 6.)

The following is a list of the only *final* maps made of the streets and avenues "*involved*" along the line of the Manhattan and Queens Traction Corporation and *signed by the secretary of the Board* and *filed* in conformity with the provisions of section 439 of the City Charter so as to make them *final*.

- (1) "Map establishing the *lines and grades* of

Lambertville Avenue from Sutphin Road to Mer-rich Road in the Fourth Ward".

Dated December 4, 1912, signed by Joseph Haag, Secretary of the Board of Estimate and Apportionment on same day, adopted by the Board of Estimate and Apportionment September 19, 1912, approved by the Mayor September 30, 1912 and filed same day.

(2) "*Map adjusting the lines of Lambertville Ave. from Sutphin Road to Spangler St. and establishing the lines and grades of Spangler St., from Lambertville Ave. to Brinckerhoff Ave.; Brinckerhoff Ave. from Spangler St. to Smith St.; Smith St. from Brinckerhoff Ave. to Ulster Ave.; Ulster Ave., from Smith St. to Westchester Ave.; Westchester Ave., from Ulster Ave. to 117th Ave.; 117th Ave., from Westchester Ave., to Dearborn Ave., Dearborn Ave., from 117th Ave., to New York City line in the Fourth Ward.*"

Dated December 29, 1913, signed by Joseph Haag, Secretary of the Board of Estimate and Apportionment on the same day, adopted by the Board of Estimate and Apportionment on the 23rd day of October, 1913 and approved by the Mayor on the 31st day of October, 1913 and filed same day.

(3) *Map showing a change in the street system heretofore laid out by altering the lines of Spangler St., from Lambertville Ave., to Brinckerhoff Ave., and Smith St.; from Brinckerhoff Ave., to Ulster Ave., in the Fourth Ward.*"

Map dated November 20, 1914 and signed by Joseph Haag, Secretary of the Board of Estimate and Apportionment on the same day, adopted by the said board on the 25th day of September, 1914 and approved by the Mayor on the 14th day of October, 1914 and filed same day.

(4) Map *altering the lines and grades* of Lambertville Ave., from Sutphin Road to Merrick Road in the Fourth Ward."

Dated April 29, 1915, signed by James Matthews, Acting Secretary of the Board of Estimate and Apportionment on the same day, adopted by the said board on the first day of April, 1915, and approved by the Mayor on the first day of April, 1915 and filed same day.

(5) "Map 6 annexed to transcript at page 185 dated August 14, 1915 altering the grades of old Central Avenue so as to make them conform to the user grades on the ground."

These are the only final maps of the streets along the line of the appellant, from Sutphin Road to the City line.

Provisions of Contract of October 29, 1912, as to Time of Construction.

The South Shore Traction Corporation agreed to construct and put in operation its line from the Bridge Plaza to the City line, within the following times:

To Greenpoint Avenue	On or before October 31, 1912,
" Broadway	" " December 21, 1912,
" Long Island Railroad	
Station	" March 31, 1913,
" City Line	Within six months after Borough President is willing to issue permits.

It was provided that on failure of the Company to construct and put in operation any of these sections of its railway its franchise should "*cease and determine*" (pp. 44-45).

After the assignment of this franchise to the Manhattan and Queens Traction Corporation, and on January 28, 1913, the Board at the request of this corporation extended the time to construct and put in operation this street surface railroad as follows:

To Greenpoint Avenue on or before January 29, 1913,	
" Broadway " " "	March 31, 1913,
" Long Island Railroad Station " " "	June 29, 1913.

(p. 69)

The Board granted this corporation a further extension of time at its request for such construction and operation as follows:

To Greenpoint Avenue on or before February 13, 1913,	
" Broadway " " "	April 30, 1913,
" Long Island Railroad Depot " " "	September 30, 1913.

(p. 69)

Again on September 30, 1913, the Board at the request of this corporation extended its time to complete and construct this railway between Broadway and the Long Island Railroad Station, as follows:

To Long Island Railroad station on or before January 31, 1914. (p. 69).

Petition for Amendment of Contract of October 29, 1912.

On October 19, 1915, this corporation petitioned the Board for a further extension of time to construct and put in operation this railway and also for a modification in this contract, as follows:

By amending Section 3, Eighth, so as to authorize the corporation to construct and operate its railway at grade across the freight side tracks on Sutphin Road (Guilford Street) leading from the main line of the Long Island Railroad Company to the warehouse of Messrs. J. and T. Adikes. (pp. 69, 70).

The Board by resolution allowed these modifications and the following is the resolution and on page 12 is in part the amendatory contract of January 21, 1916,

"RESOLVED, That the Board of Estimate and Apportionment hereby consents to certain modifications in the terms and conditions of the said contract of October 29, 1912, such modified terms and conditions being fully set forth and described in the following form of proposed contract for the grant thereof, embodying such terms and conditions as modify or alter said contract of October 29, 1912, which said contract otherwise remains unchanged as to all the other terms and conditions expressed therein, and that the Mayor of the City of New York be and he hereby is authorized to execute and deliver such contract in the name and on behalf of The City of New York as follows, to wit:

(p. 67).

Then in the minutes of the Board follows the proposed form of contract unexecuted and following it the unanimous vote of The Board adopting the resolution quoted above.

The executed contract which was delivered and accepted by the Corporation is in part as follows:

Amendatory Contract of January 21st, 1916.

This contract made and executed in duplicate this 21st day of January, 1916 by and between The City of

New York (hereinafter called the City) party of the first part, the Mayor of said City, acting for and in the name of said City, *under and in pursuance* of the authority of the Board of Estimate and Apportionment of said City (hereinafter called the Board) *and the Manhattan and Queens Traction Corporation* (hereinafter called the Corporation) party of the second part, witnesseth:

• • •

"Whereas, Section 3, Eighth, of said contract dated October 29, 1912, provided that the railway therein authorized should not cross any railway or railroad other than street surface railways encountered in its route at grade; and

Whereas, The Corporation has, by a petition dated October 19, 1915, applied to the Board for certain amendments in and to said Section 3, Seventh and Eighth of said contract of October 29, 1912, as follows:

(a) By striking out in said Section 3, Seventh, so much of said paragraph relating to the completion of construction of that portion of the railway between the former Village of Jamaica and the City Line within (6) months after notification by the President of the Borough *that he is willing to issue a permit for the construction of tracks on the streets involved* and inserting in lieu thereof a provision requiring the completion and placing in operation of that portion of the railway between its present terminus and the intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street), on or before August 1, 1916, *and the completion and placing in operation of the remainder of said railway, or portions thereof, within such time or times, after August 1, 1916, as may be directed by resolution of the Board.*

(b) *By amending said Section 3, Eighth, so as to authorize the Corporation to construct and op-*

erate its railway at grade across the freight side-tracks on Sutphin Road (Guilford Street) leading from the main line of the Long Island Railroad Company to the warehouse of Messrs. J. & T. Adikes.

Now, therefore, in consideration of the sum of fifty dollars (\$50), to be paid by the Corporation to the City on or before January 1, 1916, and of the mutual covenants and agreements herein contained, the parties hereto do hereby covenant and agree as follows:

Section 1. The parties hereto hereby consent, subject to the provisions and conditions herein-after set forth, to certain modifications and amendments in and to said contract of October 29, 1912, as amended, said modifications and amendments to be as follows:

1. All of said Section 3, Seventh, of said contract of October 29, 1912 is hereby stricken out and the following substituted therefor:

'Seventh. The Company shall complete and put in operation that portion of the railway herein authorized from the Manhattan Terminal of the Queensboro Bridge to the intersection of the tracks of the Long Island Railroad with Thompson Avenue at or near Greenpoint Avenue on or before February 13, 1913, from the intersection of the tracks of the Long Island Railroad Company with Thompson Avenue to the intersection of Thompson Avenue and Broadway on or before April 30, 1913, from the intersection of Thompson Avenue and Broadway to the proposed new Long Island Railroad station in the former Village of Jamaica, on or before January 31, 1914.

'The Company shall complete and put in operation that portion of its railway herein authorized between the present terminus thereof, at the Long Island Railroad Company's station, at Jamaica, and the intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pa-

cific Street), on or before May 1, 1916, and the remainder of said railway between said intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street) and the City Line at Central Avenue within such time or times as may be directed by resolution of the Board upon recommendation of the President of the Borough, provided that title to the streets involved **has been vested in the City and that said streets have been regulated and graded.**

"Upon the failure of the Company to complete the construction and place in operation any of the said portions of the railway on or before the dates or times herein specified, the right herein granted shall cease and determine, and all sums or securities paid to the City, or deposited with the Comptroller as security for performance by the Company of the terms and conditions of this contract, as herein provided, shall be forfeited to the City without action by the City provided, however, that the Board may extend the time within which to complete the construction and place the railway in operation as it may deem just and equitable.

2. All of said Section 3, Eighth, of said contract of October 2, 1912, is hereby stricken out and the following substituted therefor:

‘Eighth. Said railway shall not cross any railway encountered in the route at the grade thereof, but shall be constructed either above or below the grade of such railway or railroads; provided, however, that the Company may construct and operate the railway herein authorized at grade across the freight side-track now located on Sutphin Road (Guilford Street) leading from the main line of the Long Island Railroad Company to the warehouse of Messrs. J. and T. Adikes, under such regulations and conditions as may be prescribed by the Public Service Commission of the State of New York for the First District. If any railway or railroad other than street surface

railways are operated at the same grade of the streets or avenues in which the Company is hereby authorized to construct a railway, then the Company may construct at its own expense and use a temporary crossing and approaches thereto either upon private property or within the lines of such streets or avenues to be determined by resolution of the Board, and continue to use such temporary crossing until such time as either the grade of such street or avenue or such railway or railroad shall have been changed so that such railway or railroad shall not cross such street or avenue at the grade thereof. When such grade shall have been changed and a permanent crossing shall have been constructed to carry such street or avenue either above or below the grade of such railway or railroad, then the Company shall, upon the order of the Board, abandon the above described temporary crossing and construct its tracks upon such permanent structure as shall be directed by the Board. Any property acquired in fee by the Company for the purpose of the temporary crossing hereinbefore provided for shall be ceded to the City without compensation therefor by the Company when the same is required by the City for the purpose of widening such street or avenue, upon the removal of the crossing and approaches thereto, to the permanent crossing structure.'

Section 2. The grant of the privileges is subject to the following conditions:

All the terms, provisions and conditions contained in said contract dated October 29, 1912, as amended by said contract dated July 21, 1913, excepting those which are herein expressly amended or modified, shall remain unchanged and in full force and effect.

Section 3. The Corporation promises, covenants and agrees on its part and behalf to conform to and abide by and perform all the terms and conditions and requirements in this contract fixed and contained.

In witness whereof, The party of the first part, by its Mayor thereunto duly authorized by the Board of Estimate and Apportionment of said City, has caused the corporate name of said City to be hereunto signed and the corporate seal of said City to be hereunto affixed and the party of the second part, by its officers thereunto duly authorized, has caused its corporate name to be hereunto signed and its corporate seal to be written.

(Corporate Seal) THE CITY OF NEW YORK,
By GEORGE McANENY,
Acting Mayor.

Attest:

P. J. SCULLY,
City Clerk.

MANHATTAN AND QUEENS TRACTION
CORPORATION,

By ROBERT S. SLOAN,
President.

(Seal)

Attest:

S. B. SEVERSON,
Secretary."

(acknowledgments)

(PP. 69-72).

This corporation constructed and put in operation this railway out to Sutphin Road and Lambertville Avenue on or before May 1, 1916, as provided in said amended contract of January 21, 1916.

As to the Direction of the Board to Complete the Road.

The President of the Borough of Queens, in pursuance of the provisions of the amendatory contract of January 21, 1916, presented on January 26, 1917 a communication to the Board requesting them to adopt a resolution directing the Manhattan and Queens Traction Corporation to complete and put in operation that por-

tion of its street surface railway between the intersection of Sutphin Road and Lambertville Avenue and the intersection of Central Avenue with Springfield Road, as provided in said amendatory contract of January 21, 1916. (p. 17 hereof).

The Board thereupon passed a resolution which, without preamble, is as follows:

"RESOLVED, That pursuant to said Section 3, Seventh of said contract of October 29, 1912, as amended by said contract of January 21, 1916, the *Manhattan and Queens Traction Corporation* be and it hereby is directed to commence construction of that portion of its street surface railway authorized by said contract of October 29, 1912, as amended by said contract of July 21, 1913, from the intersection of Sutphin Road and Lambertville Avenue to the intersection of Central Avenue and Springfield Road, within thirty (30) days, and to complete and put in operation said portion of its street surface railway within six (6) months from the date of the approval of this resolution by the Mayor."

[Preamble and resolution appear on pages 21-22].

This resolution was approved as provided in said amendatory contract of January 21, 1916, by Hon. John Purroy Mitchel, Mayor, on *February 23, 1917* (p. 10).

According to this resolution and date of its approval the company was obliged to construct and put in operation this portion of its franchise from Sutphin Road and Lambertville Avenue out to Springfield Road by *August 23, 1917*.

The distance and lineal miles of trackage along the line of this railway from Sutphin Road and Lambertville Avenue out to Springfield Road was about $3\frac{1}{4}$ miles, made up as follows:

Double Tracks

Sutphin Road to Merrick Road..... 1.36 miles

Single Track

Merrick Road to Springfield Road..... 1.89 “

Total 3.25 “

Construction not ordered.

Springfield Road to City Line..... 1.00 “

What the corporation claims to have done under this permit was in part stated by its president on August 19, 1917, in a petition to the Board, dated *August 16, 1917*.

“The Corporation reports that it has obtained a permit from the Bureau of Highways in the Borough of Queens to construct its road on Lambertville Avenue.

“The Corporation has erected steel poles and placed suspension wires to support the trolley wire on Lambertville Avenue from Sutphin Road to Spangler Street. Although an order has been placed for the trolley wire with John A. Roebeling's Sons, this wire has not been delivered.

“After long negotiations with Long Island Railroad Company, terms of a contract for the erection of a trestle over its right of way across Lambertville Avenue have been agreed upon with one exception. Undoubtedly, an agreement will be reached this month.

“The Corporation has on hand the greater part of the material with which to construct this trestle.

“The Corporation has ordered the special work for the curve at Sutphin Road and Lambertville Avenue, the necessary turn-outs for the trestle over the tracks of the Long Island Railroad Company and the double track crossings for

the crossing of the tracks of the Long Island Electric Railway Company at New York Avenue. A contract has been entered into with the Long Island Electric Railway Company, permitting this crossing. The curve at Sutphin Road and Lambertville Avenue has been installed and the crossing at New York Avenue will be installed during this month.

"The Corporation has placed its order for ties and approximately nine hundred (900) ties have been delivered.

"The Corporation has all of the necessary special overhead material on hand for Lambertville Avenue."

(p. 25).

This petition concluded as follows:

"WHEREFORE, your petitioner respectfully asks that your Board grant it an extension of six (6) months from the date when it shall receive the necessary material with which to complete and put into operation that portion of its street surface railroad from the intersection of Sutphin Road and Lambertville Avenue to the intersection of Central Avenue and Springfield Road in the Borough of Queens.

Dated August 16th, 1917.

MANHATTAN AND QUEENS TRAC-
TION CORPORATION,

By (Sgd) S. B. SEVERSON,
President.

(Corporate Seal)

(Sgd) LINDLEY C. COLEMAN,
Secretary."

(Verification)

Default of the Corporation.

The Manhattan and Queens Traction Corporation failed to construct any portion of its railway from Sutphin Road and Lamberville Avenue out to Springfield Road as directed by the Board on February 16, 1917. The matter of this default came up on the calendar of the Board for consideration on *October 19, 1917*, and a resolution (p. 28) was adopted directing this corporation to show cause on *November 9, 1917*, why its franchise should not be forfeited and its property in use in the streets vest in the city. This resolution reads:

“Resolved, That the Manhattan and Queens Traction Corporation be and it is *hereby notified*, under and pursuant to *Section 5, Thirteenth, of the contract dated October 29, 1912*, by and between The City of New York and the South Shore Traction Company, which said contract was, with the consent of the Board of Estimate and Apportionment given by resolution adopted November 21, 1921, and approved by the Mayor November 22, 1912, assigned to the Manhattan and Queens Traction Corporation, *to appear before the Board of Estimate and Apportionment on November 9, 1917*, at a meeting of said Board to be held on said date, at 10:30 o'clock A. M., in Room 16, City Hall, Borough of Manhattan, and show cause why a resolution decreeing forfeited the contract dated *October 29, 1912*, granting a franchise to the South Shore Traction Company and subsequently assigned to the Manhattan and Queens Traction Corporation and the contracts dated July 21, 1913, and January 21, 1916, by and between The City of New York and the Manhattan and Queens Traction Corporation, amending said contract dated *October 29, 1912*, should not be adopted, and why such resolution shall not provide that the railway constructed and in use by virtue of said contracts shall thereupon become the property of The City of New York without proceedings at law or in equity; and be it further

“Resolved, That the Secretary of this Board be and he *hereby is directed to forward to the Manhattan and Queens Traction Corporation copies of these resolutions and notify said Corporation in writing, that on the aforementioned date, at said time and place, said Corporation will be allowed a hearing before final action is taken.*”

(p. 28)

A copy of this resolution was served on the Corporation on October 20, 1917. (Petition par. XXII, p. 14.)

It appears that on August 18, 1917, the Corporation addressed to the Board a petition for an extension of six months in which to build. *The Board was at this time in Summer Recess and did not convene until September 21st 1917.* (City's answer par. “fourth” pp. 87, 88).

On this day this petition was presented for the first time to the Board and was then referred to its Bureau of Franchise for report (*idem*). This Bureau made up its report and presented same to the Board on October 19, 1917, together with the resolution giving notice to the corporation to appear and show cause (p. 23 hereof) and at the same time the petition of the Corporation for an extension was presented.

Mr. Robert S. Sloan, counsel to the corporation, appeared at this meeting of the Board on October 19, 1917, and asked to be heard on the petition of the Corporation. What occurred at this meeting is best related by the Secretary of this corporation in a letter dated October 20, 1917, to the Board (p. 27), as follows:

“The President of the Borough of Queens, however stated that he himself would ask for a consideration of this matter, and stated to Mr. Sloan that the Board would reconvene at 11 o'clock October 20th, 1917. On October 20th, at said time, Mr. Sloan again appeared and presented the matter. The President of the Board of Aldermen,

sitting as Mayor, granted this corporation permission to file a petition for reconsideration, stating that he would vote for a reconsideration of the matter."

The company asked the Board that its petition for an extension of time be brought upon November 9, 1917, for consideration with the order to show cause why the forfeiture should not be granted. Which was done. What occurred thereafter the corporation states in its petition as follows:

"That thereafter on October 26, 1917, both matters were restored to the calendar of the Board of Estimate and Apportionment and the second day of November fixed for consideration thereof; that on the second day of November both matters were adjourned until November 9th and again on November 9th to November 16th and on November 16th to December 21st, 1917, for hearing. The order of this Court appointing your petitioners as Receivers was delivered to the Board of Estimate and Apportionment on November 16, 1917, * * *,"

(p. 14).

The Proposed Resolution of Forfeiture.

The Bureau of Franchise of the Board (whose administrative duty was to attend to its detail work) subsequent to the presentation of its report on the failure of the Corporation to construct and the adoption by the Board of its resolution directing the Corporation to show cause, began preparation of a resolution which required extensive preambles (pp. 33 to 37 also appearing in margin of opinion, Court of Appeals, pp. 138 to 141.) *This resolution was not prepared under any express direction of the Board or any of its members. The Board*

could not have made up its mind before a hearing and no employee of the Bureau could have told what the Board would have done after the Corporation had shown cause. The Board, perhaps, would have granted the Corporation's petition extending its time to construct. Every request made theretofore by the Corporation to the Board had been granted. Such men as the late lamented John Purroy Mitchel, Hon. William A. Prendergast, now State Public Service Commissioner and Hon. George McAneny, now a member of the present Transit Commission of the City, would certainly not have acted contrary to the interests of the people of the City or unfairly to the company. However, this may be, *the resolution was drafted in strict conformity with the contract (Section 5, paragraph "thirteenth") and its amendments and Sections 73 and 74 of the Greater New York Charter as amended.*

The adoption of this resolution would not have resulted in any *physical molestation* of the property of the Corporation or have been an interference in any way with the possession or control of its property.

Federal Action Commenced.

On November 15, 1916, the *Gas and Electric Securities Company* an alleged creditor of the corporation verified and filed a bill of complaint in an equity action brought in the United States District Court for the Eastern District of New York alleged to have been commenced to preserve the assets of the Manhattan and Queens Traction Corporation, and asked to have Receivers appointed. (pp. 80-84). The Manhattan and Queens Traction Corporation *filed an answer* verified also November 15, 1917, *admitting the allegations of the complaint and also joining in the request for the appointment of receivers* (pp.

85, 86). On the same day an order was made by the District Judge, Hon. Thomas I. Chatfield, appointing William R. Begg and Arthur C. Hume, Receivers, which order contained the usual injunction clause (pp. 76-78). By order dated December 26, 1917, these Receivers were made permanent (pp. 78, 79).

This was plainly a voluntary receivership.

These receivers are still holding and operating this railway.

On December 19, 1917, these receivers (pp. 6-19) brought a proceeding *by petition* (pp. 6-19) entitled

"In the Matter of the Petition of William R. Begg and Arthur C. Hume, Receivers of Defendant, relative to the Franchise and Property of the Defendant"

and under this sub-title in the action entitled "Gas and Electricity Securities Company, Plaintiff, against the Manhattan and Queens Traction Corporation, Defendant," obtained an order (pp. 3-5) from Hon. Thomas I. Chatfield, District Judge, restraining the Board from adopting a resolution revoking the franchise of the Corporation and directing The City of New York to serve on the Receivers an answer on or before *December 24, 1917* and further directing the City to show cause before him on *December 26, 1917*, at 2 p. m. why this restraining order granted by him should not be made permanent. The restraining order in the order to show cause was substantially the same as the order continuing the injunction and making said order permanent. (p. 2 hereof).

On the return day of the motion the City appeared specially and filed the following preliminary objections to the hearing of the above entitled motion. (pp. 1-2).

"The City of New York hereby files the fol-

lowing preliminary objections to the hearing of the above entitled motion by this Court, to wit:

I. The District Court of the United States is without jurisdiction to stay or enjoin the passage of the proposed resolution revoking or purporting to revoke the franchise of the Manhattan and Queens Traction Corporation, mentioned in paragraphs "XXI" and "XXII" of the said petition, *for the reason that in passing or attempting to pass such a resolution, the Board of Estimate and Apportionment of The City of New York would be acting in a legislative capacity and any such act of revocation would be a legislative act with which this Court, as a part of the judicial branch of the Government of the United States, would have no right to interfere.*

II. The District Court of the United States is without jurisdiction to stay and enjoin the passage of the proposed resolution of the Board of Estimate and Apportionment in the summary manner attempted *in the above entitled proceedings and in the proceedings brought in and entitled in the original action in which the receivers were appointed to preserve the property of the Manhattan and Queens Traction Corporation, on the ground that such a stay or an injunction could only be granted in a plenary suit commenced in equity where the facts necessary to bring the complainants or petitioners within the jurisdiction of the United States District Court, appear in the complaint.*

III. The petition of the receivers herein does not show the necessary jurisdictional facts permitting them to sue in the District Court of the United States *and their sole remedy is in an action in equity for an injunction brought in the State court.*

IV. The District Court of the United States is without jurisdiction to grant an injunction herein for the reason that even if the Board of

Estimate ad Apportionment passed the resolution mentioned in paragraphs "XXI" and "XXII" of the petition, *it would be ineffectual to impair the rights or franchise of the Manhattan and Queens Traction Corporation in the event that it was made to appear that the title to the "streets and avenues involved", mentioned in petition, were not in the City of New York and that the same were not "regulated and graded" and for this reason a court of equity has not the power to stay the passage of said proposed resolution, and that the proper remedy of the Manhattan and Queens Traction Corporation, in case of any interference by The City of New York with their property after the passage of such resolution would be a suit in equity to restrain such interference.*" (pp. 1, 2).

These objections were forthwith overruled by the Court.

The City thereafter again renewed these objections and filed an answer and answering affidavits to the petition of the Receivers under the direction of the District Court, but still claiming that *it could not obtain a proper trial of the question involved in this case on affidavits and that the rights of the City could only be protected by a viva voce trial where witnesses could be examined and heard. These objections however were overruled by the District Judge who proceeded to determine the matter on its merits, and thereafter made permanent the sweeping injunction appearing at pages 121-127 of the record herein. (See p. 2 hereof).*

The final order granting this injunction was reversed by the Circuit Court of Appeals. (See 266 Fed. Rep. 625).

Old Town of Jamaica.

In order to properly understand this case it is necessary for this Honorable Court to know that the territory covered by the portion of the railway route in question lies within the limits of what was formerly the *old town of Jamaica* in the *County of Queens* which became part of the Greater New York on *January 1, 1898*, under the provisions of *Chapter 378 of the Laws of 1897* known as the Greater New York Charter.

Necessity for this Railway.

In order to show the importance and necessity for this road we quote in part the opinion of the Public Service Commissioner Bassett, rendered June 8, 1909, on the original application of the South Shore Traction Company for a certificate of convenience and necessity over the same route granted in the franchise of the appellant with few minor changes. (1 P. S. C. R. 1st Dist. N. Y., p. 590.)

The company's route within the city limits covers a distance of *thirteen miles* in the Borough of Queens and *one and a half mile* on the Queensboro Bridge. A double track railway is proposed for practically the entire route except the portion on Central Avenue southeast of Jamaica. At present there is no trolley line extending from the eastern limits of the Borough of Queens into Manhattan or within several miles of the East River. The lines of the Long Island Electric Railway Company and the New York & Long Island Traction Company, which enter the city from Nassau County, extend no further west than the eastern limits of the Borough of Brooklyn near Woodhaven. On the other hand, the lines of the New York and Queens County Railway Company

extend no further east than Jamaica and Flushing, and do not as yet cross the East River into Manhattan. *The company's route traverses the heart of the Borough of Queens by a direct line and strikes Manhattan almost exactly at right angles.* The territory through which this route is laid out is almost totally undeveloped for residence purposes, except at the village of Jamaica. Yet it lies directly opposite the densely peopled borough of Manhattan, separated from it only by the East River. The *Borough of Queens* has an area nearly six times the size of Manhattan. *The territory between Long Island City and Jamaica lying one mile on either side of the South Shore route is equal to all that portion of Manhattan north of 59th street.* This territory has remained almost without population because of the absence of transit facilities. Until 1883 there was no way of getting across the East River except by boat. In that year the New York and Brooklyn Bridge was opened, far below the Borough of Queens, however. It was twenty years before another means of crossing the river was provided. *But the period of seven or eight years beginning with December 19, 1903, when the Williamsburg Bridge was opened, will have seen the opening of six different bridges and tunnels with facilities for through operation of cars into Manhattan.* Three of these, the Queensboro Bridge, the Pennsylvania tunnels and the Steinway tunnel, tap the Borough of Queens directly, while the Brooklyn Bridge, the subway and especially the Williamsburg Bridge, tap it indirectly. If to these tunnels and bridges are added adequate transit facilities in Queens itself, there must inevitably be a *wonderful development* in the population of this borough within the next few years. *What may happen in fifty years is utterly beyond our power to calculate.* The South Shore Traction Company's route is a trunk line admirably adapted to the de-

velopment of a great territory within easy reach of the myriads who are now crowding Manhattan because they must live where they can have reasonable access to their work. From Fulton street, Jamaica, to 59th street and Second avenue, Manhattan, is only about eight miles, or the same distance as from the latter point to Kingsbridge.

"It is hardly necessary to say that this Commission looks with unusual favor upon the proposed route of the applicant company, running as it does on a great thoroughfare that strikes like an arrow into the heart of Manhattan. It goes without saying that the provision of adequate transit facilities, bringing a vast residence territory lying opposite Manhattan Island within easy reach of the business centers of the city, would be of inestimable benefit to the entire community."

(Re appl'n of South Shore Traction Company.)

CLAIM OF RECEIVERS WHO ARE THE PETITIONERS AND APPELLANTS.

(A) The receivers contended that the resolution of the Board of Estimate and Apportionment of February 16, 1917 (fols. 112 and 54) violated section 3, paragraph "seventh," of the contract of October 29, 1912, as amended by the contract of January 21, 1916, and was therefore void for the following reasons:

1. *Title was not vested on February 16, 1917, in The City of New York to portions of the streets involved.*

(Pet., par. XIII.) (pp. 10, 11).

2. *Portions of the streets involved were not regu-*

lated and graded to their *legal grade* and *full width* on February 16, 1917.

(Pet., par. XIII.) (pp. 10, 11.)

3. A. Title to the right of way of the Long Island Railroad Company upon which its tracks cross Lambertville Avenue at Carlisle Street, is not vested in the City.

(Pet., par. XIII.) (pp. 10, 11.)

B. The right of way of the Long Island Railroad Company is fenced in on each side where it crosses Lambertville Avenue.

(Pet., par. XIII.) (pp. 10, 11.)

C. Lambertville Avenue is not graded to its proper legal grade at this point, but only to a temporary grade.

(Pet., par. XIII.) (pp. 10, 11.)

D. When Lambertville Avenue shall be legally and physically opened and graded, it will pass under the tracks of the Long Island Railroad Company, as set forth in the order of the Public Service Commission dated November 9, 1912, in Case No. 1567.

(Pet., par. XIII.) (pp. 10, 11.)

4. Title to the right of way of the Long Island Railway Company, where its tracks cross Westchester Avenue at grade near Montauk Avenue, is not vested in The City of New York.

(Pet., par. XIII.) (pp. 10, 11.)

5. Title only to the traveled roadway on old Central Avenue, now including Ulster Avenue, Westchester Ave-

nue, 117th Avenue and Dearborn Avenue, is vested in The City of New York.

(Pet., par. XIV.) (p. 11.)

6. Title to said old Central Avenue, now Dearborn Avenue, between Springfield Road and the City Line, is not vested in The City of New York.

(Pet., par. XIV.) (p. 11.)

7. No grading work has been done on old Central Avenue, between Merrick Road and Springfield Road, except the laying of an asphalt concrete pavement about 16 feet to 20 feet wide.

(Pet., par. XIV.) (p. 11.)

8. There is a line of poles on each side of said asphalt line in Central Avenue, which poles are approximately 33 feet apart and about 6 feet from the edge of the said asphalt, which poles would interfere with the construction of the railway on old Central Avenue, as it now exists unless said trolley line is constructed in said asphalt roadway.

(Comp., par. XIV.) (p. 11.)

9. The resolution directing the extension of the line was adopted February 16, 1917, without notice to the Company.

(Pet., par. XI.) (p. 11.)

10. The Manhattan & Queens Traction Corporation has not acquired the right to cross the right of way of the Long Island Railroad Company on Lamberville and Central Avenues.

(Pet., par. XVI.) (p. 12.)

(B) The receivers pleaded impossibility of performance of said resolution of February 16, 1917, of the Board on the following grounds:

11. Prior to the expiration of thirty days after February 23, 1917, the Manhattan & Queens Traction Corporation ordered materials, made surveys and obtained consents of property owners.

(Pet., par. XVII.) (p. 12.)

12. An excavation was made in Lambertville Avenue in which ties and rails were laid between Sutphin Road and Spangler Street, a distance of 3000 feet, and steel poles were erected.

(Pet., par. XIX.) (p. 13.)

13. It was physically impossible for the Manhattan & Queens Traction Corporation to procure the steel rails and certain other material for the purpose of building said extension, as required by said resolution of February 16, 1917.

(Pet., par. XIX.) (p. 13.)

14. On account of high costs it was physically impossible to comply with said resolution of February 17, 1917.

(Pet., par. XXI.) (p. 13.)

(C) The receivers claim The City was estopped from claiming a forfeiture of the franchise contract of October 29, 1912, and the property of this corporation on the following grounds:

15. A. On November 1, 1917, the Manhattan & Queens Traction Corporation paid the Comptroller of The City of New York, in accordance with the terms of said fran-

chise contract of October 29, 1912, for percentages of gross receipts for the year ending September 30, 1917, and for bridge tolls for the year ending September 30, 1917, and also for track and terminal privilege on the Queensborough Bridge for the year ending September 30, 1917, the sum of \$17,175.44, which was accepted by The City of New York.

Pet., par. XXIX.) (p. 13.)

B. The Corporation paid to The City of New York on November 1, 1917, \$200 for the privilege of certain crossovers and turnouts in the streets.

Pet., par. XXIX.) (p. 13.)

C. That certain of these taxes accrued after August 23, 1917, and were accepted by the City thereafter.

(Pet., par. XXX.) (p. 17.)

(D). The receivers claim that the proposed action of the Board as indicated by its notice to the corporation (fol. 151) of a hearing for November 9, 1917, was illegal and ultra vires of The City for the following reasons:

16. If the Traction Corporation be in default, it is in default only as to the resolution of the Board of Estimate and Apportionment of February 16, 1917, and not as to the provisions of said contract of January 21, 1916.

(Pet., par. XXXI.) (p. 17.)

17. The State has placed within the jurisdiction of the Public Service Commission the power and right to direct the said extension of said Traction Corporation's line and has taken all power to so direct from the Board of Estimate and Apportionment.

(Pet., par. XXXI.) (p. 17.)

18. The threatened action of the Board of Estimate and Apportionment is in violation of Article First, Sections VI and VII, of the Constitution of the State of New York, and the 5th and 14th amendments to the Constitution of the United States, in that such action would deprive the said Traction Corporation of its property without due process of law and take its private property without compensation.

(Pet., par. XXXI.) (p. 17.)

19. A. That the Charter of The City of New York does not provide that a franchise contract may contain a provision for the forfeiture of the property of the grantee without compensation for a mere breach of franchise prior to the termination thereof.

(Pet., par. XXXI.) (p. 17.)

B. Such charter does not give The City of New York the right to forfeit a franchise without compensation.

(Pet., par. XXXI.) (p. 17.)

20. That action tending towards the forfeiture of the franchise of said Traction Corporation must be taken by the State and not by The City of New York and that the City has not the power to enforce a fine or penalty.

(Pet., par. XXXI.) (p. 18.)

The Court of Appeals decided:

I. The order was *final*.
(p. 140.)

II. The receivers were justified in proceeding *summarily by petition and rule* against the Board which was

a stranger to the main receivership suit and these receivers were not obliged to commence a plenary suit for the relief sought, and that the Board was not entitled to a *vive voce* trial where witnesses could be orally examined.

(p. 143.)

III. The Court had no right to restrain the Board from acting under the provisions of Section 5, Paragraph "Thirteenth" of the contract of October 29, 1912, as amended by the contract of January 21, 1916, and for these reasons:—

(a) Sec. 5 Paragraph "Thirteenth" (p. 5) hereof) was legal and enforceable; *was required by the City Charter* and gave the City the right to forfeit the contract.

(p. 143.)

(b) The action sought to be restrained was *legislative* in character.

(p. 144.)

(c) Courts of equity will not interfere with legislative or governmental powers but will in a proper case prevent their enforcement.

(p. 144.)

(d) The Board had power to proceed to rescind this franchise *according to its terms* and the right of action was not confined to the Attorney-General.

(p. 145.)

(e) The corporation was bound to perform the contract and presented no proper excuse for non-performance.

(p. 145.)

(f) The corporation did not comply with the provisions of sec. 3 par. seventh of the contract and because it did not do so its franchise automatically ceased and determined.

(p. 146.)

(g) A company which accepts the benefits of a grant, subject to conditions, is estopped to contest the validity of the conditions. A determination of this point, however, was held unnecessary. (p. 146.)

IV. The Court pointed out that it made no difference if the franchise was automatically forfeited under Section 3, Paragraph "Seventh" of the contract (p. hereof). (p. 147.)

V. The Court found that "*title to the streets involved*" were vested in the City and these streets were "regulated and graded" as required by Section 3, Paragraph "Seventh" of the contract of October 29, 1912, as amended by the contract of January 21, 1916. (pp. 147-148, inclusive.)

VI. The Court construed the contract as providing that on failure to construct any portion of the route the whole franchise was forfeitable. (p. 149.)

VII. That the receipt of taxes and other payments by City's officers cannot be construed as a waiver of the City's right to forfeit. (p. 149.)

VIII. That the Court will not grant relief from a forfeiture where by agreement a specific act is to be done within a stipulated time and time is made the essence of the contract. Time was of the essence of this contract. (p. 149.)

The Court reversed the order granting the injunc-

tion "without prejudice, however, to the right of the receivers to renew their application after the adoption of the proposed resolution by the Board of Estimate and Apportionment if the receivers then have reason to believe that The City of New York is proposing to take in its possession any of the visible and tangible property which has come into their hands as receivers * * *."

(p. 150.)

ASSIGNMENT OF ERRORS.

The appellants have thrown their 91 assignments of errors into the smallest possible compass as follows:

1. That the Court of Appeals was without jurisdiction.
2. That the contract does not mean what the Court of Appeals construed it to mean.
3. That in passing the resolution of forfeiture the Board would not be acting legislatively, but would be asserting and enforcing a contract right without judicial sanction.
4. That the receivers and their predecessors in interest had legal execution for non-compliance.
5. That equity should relieve.

(Appellant's Brief, page 84.)

MOTION TO DISMISS.

The subject matter of this appeal is a grant from the Board of Estimate and Apportionment of the City of New York to a railroad company, which for the alleged non-performance of one of its conditions requiring construction, the Board undertook to rescind.

Appellants are on the horns of a dilemma:

(1) If the passage of the proposed resolution would be an exercise of legislative power the Court should not interfere with its consideration.

(2) If it is not legislative, then there is no federal question, and the appeal should be dismissed.

The receivers of such railroad grantee, appointed in an equity suit, are appellants here and claim that this franchise grant was made by the Board in its *administrative* and not in its *legislative capacity*; that what the Board proposed to rescind was an *ordinary contract*, which act of repeal would be in no way a *legislative*, but merely an *administrative act*.

(Appellants' Brief, pp. 187, 133, 134, 171.)

"It is obvious * * * that the United States Court was authorizing its receivers to enter into a *contract* and was not participating in legislation."
(Rec's. Brief, p. 187).

"It (passage of the resolution) would be distinctly *an exercise of private proprietary rights asserted by the city and denied by the receivers*."
(Rec's Brief, p. 133.)

The jurisdiction of the District Court, in the original equity suit in which the receivers were appointed was based alone on *diversity of citizenship*.

It was, however, alleged in the petition of these receivers filed in the proceedings to restrain the City,

(which, by the way, was not a party to the main receivership suit) that the threatened action by the Board of Estimate and Apportionment of the City would be in violation of the *Fifth* and *Fourteenth* Amendments of the Constitution of the United States, in that such threatened acts would deprive the railroad company of its property without due process of law, and take this private property for public use without just compensation.

The proceedings in which the order was made was begun by petition and was entitled in the main receivership suit.

If the receivers' contention be correct that the proposed act of the Board is not *legislative*, then there is here *no State legislation impairing the obligation of the contract and no Federal question is involved*.

Hayes v. Port of Seattle, 251 U. S., 233, 237.

There being under the provisions of this agreement an absolute right of the Board to proceed under Section 5, paragraph "thirteenth" by notice to the company through an order to show cause, no violation of the Federal Constitution or its Amendments can properly be claimed. The Board has taken the steps agreed upon in the contract as the form of procedure.

Greenwood v. Freight Co., 105 U. S., 13.

The case holds that a statute repealing the charter of a railroad company impairs the obligation of a contract, unless the Legislature reserved the right to repeal the statute conferring the charter. The same principle should apply to a case where there is a right of repeal reserved in a legislative grant from the City to the railroad.

Hamilton Gas Light and C. Co. v. Hamilton City,
146 U. S., 258.

A municipal ordinance *not passed under legislative authority* is not a law of the State within the meaning of the Constitutional Prohibition against laws impairing the obligation of the contracts.

Hamilton Gas Light & C. Co. v. Hamilton City,
146 U. S., 258.

As the question below as to the right of the Board to proceed under the express provisions of the contract turned wholly on a question of fact, there is no Federal question involved, and the decision of the Circuit Court of Appeals is final.

Del., Lack & West. R. R. v. Yurkonis, 238 U. S.,
439.

In this case Mr. Justice Day said:—

“The allegations in that respect must show as a basis of action a *substantial* controversy respecting the Constitution or laws of the United States. *Hull v. Burr*, 234 U. S., 713. In the absence of such allegations in the complaint the jurisdiction of the Circuit Court of Appeals is final. (Cases cited).”

The dispute must be real and substantial.

Hull v. Burr, 234 U. S., 712.

WHEREFORE, it is respectfully submitted that as the jurisdiction of the Federal Court rested solely on diversity of citizenship, and the jurisdiction over these proceedings depended on whether they were ancillary to the main receivership suit, and objection having been made below to the jurisdiction of the Court, the appellants have no right to come to the Supreme Court *by appeal*. Their remedy is limited to a review of the Court of Appeals by *certiorari* to this Honorable Court.

The City's contention is that *by a resolution of the Board passed in its legislative capacity* (see p. 7 hereof) the franchise was granted; that by resolution of the Board passed in that capacity the franchise was amended (see p. 14 hereof), and that the proposed resolution of repeal or recapture, if decided on, would be passed by the Board in the same capacity (see pages 138 to 141 of Transcript).

THE APPEAL SHOULD BE DISMISSED.

In support of the opinion of the Court of Appeals the Appellee makes the following points:

I.

THE ORDER APPEALED FROM WAS FINAL AS TO THE BOARD.

(1) A final order is one which disposes of the entire controversy between the parties.

La Bourgoyne, 210 U. S., 95, 112.

In this case, Mr. Justice White said:

"The rule announced in these cases, for determining whether, for the purposes of an appeal, a decree is final is in brief whether the decree disposes of the entire controversy between the parties, * * *."

In *Heike v. United States*, 217 U. S., 423, 429, Mr. Justice Day defined "final judgment" as follows:

"The definition of a final judgment or decree was tersely stated by Mr. Justice Wait in *St. Louis Iron Mining & S. R. R. Co. v. Express Co.*,

108 U. S. 24, 28, in these terms: 'A decree is final for the purposes of an appeal to this Court when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.' "

Judging by these standard definitions this order settled the entire controversy between the Board and the corporation. It determined a substantial right against the Board in such manner to leave it no adequate relief except by appeal.

Odell v. Batterman, 223 Fed., 292, 295;

followed in

American Engineering Co. v. Metropolitan By-Products Co., 275 Fed. 40, 42;

and see:

Stokes v. Williams, 226 Fed., 148, 152;

Matter of Leland, 219 N. Y., 387, 392;

St. L. I. M. & S. R. R. Co. v. S. Ex. Co., 108 U. S., 24.

In the *Leland* case it was held that the complete settlement of the controversy by an order determined its finality.

On the question of the finality of this order in the case on hand the Court of Appeals, speaking through Rogers, Circuit Court Judge, said:

"The fact that the order was without prejudice to any further application to the Court for the enforcement of any of the rights of the City certainly cannot have the effect of converting what is otherwise a final order into an interlocutory one. The injunction meant the end of the matter so far as the particular judge who issued

it was concerned, except that it did not include a change of mind on his part. The order goes just as far and lasts just as long as the district court is possessed of any authority to issue it, and is therefore 'final' and therefore appealable within the six months' period."

(2) The words "without prejudice to any further application of the Court" and the words "until the further order of the Court" affect in no way the finality of the order.

In substance, the Court said that the Board might open this matter on additional papers. This the Board could do in the absence of these provisions in the order. This permission and these words therefore gave no further right to the Board than it would otherwise have.

An analagous matter to this is *Matter of Hudson Water Works*, 111 App. Div., 860. In this case the Court allowed by a provision in the order one of the parties to renew a motion for the approval of a bond upon additional papers. It was contended that this order because of this permission to renew on additional papers was not final and therefore not appealable. On this point the Court said:

"If the right to renew another and proper bond were dependent upon this permission the order would probably not be such a final order as to authorize an appeal. (See *Robins v. Ferris*, 5 Hun, 266; *Wells Fargo & Co. v. W. C. & P. C. R. R. Co.*, 12 App. Div., 49.) The bank, however, might without such permission have presented another bond and might have asked the judge to approve of the same. The permission therefore to apply upon additional papers would seem to give no further right to the appellant than it would otherwise have. Notwithstanding such approval, therefore, it may consistently appeal if the approval of its bond was improperly refused."

The court cannot make final judgment interlocutory by a declaration in the order.

Breed v. Ruoff, 173 N. Y., 340, 342.

"The first question which is presented relates to our jurisdiction. The contention of the respondents is that the judgment is interlocutory, and, hence, not appealable to the Court. *That it has been denominated throughout as an interlocutory judgment is a fact, but that is not absolutely controlling.* This Court said in *Otten v. Manhattan R. Co.* (150 N. Y., 395, 401) that the Court below could not create a question of fact *by declaring that there was one.* So, here, the Court could not make such a judgment interlocutory merely by declaring it to be such."

If this order be merely interlocutory then the Board, as a matter of right, may insist that the District Court rehear it on the same evidence and decide this matter anew. But the Receivers and the City have both had their day in Court. After a full and complete hearing this matter has been finally determined. The Court would only rehear this matter on a petition for a rehearing which would be useless unless the Judge could be made to change his mind. The right of the City to enforce its franchise contract in conformity with the procedure outlined in Section 5, Paragraph "Thirteenth", without unreasonable delay, is plainly and undisputably a vested right and substantial right entitled to the protection of the Court. *This consent receivership will continue for years and continues at the date of this writing without any apparent prospect of termination.* In the meanwhile the appellants' right to enforce service to the people in the way provided for by the Charter and according to the procedure outlined in the franchise contract made in

pursuance of the Charter and under its provisions is seriously impaired and held in abeyance. The Board claiming a vested right to immediate possession of the road for the people's benefit was entitled to have this determined according to the terms of the contract with all reasonable speed. This order impaired the substantial right of the City and therefore it is a final order and not interlocutory.

So far as the City is concerned this order *definitely, completely and conclusively* determined these proceedings and left the City without any relief unless and until the Judge who granted the injunction changed his mind, except insofar as this grievance may be remedied on appeal.

These proceedings are against the Board which is not a party to the *main receivership suit in equity*. These proceedings were not a mere motion in an action. These proceedings were in the nature ancillary to this suit and in form of special proceedings. As the Board was not a party to the receivership action, had not intervened, and had made objection to the jurisdiction of the Court over it by and through these "*summary proceedings*" the order was final against it for all purposes and appealable.

Nelson v. U. S., 201 U. S. 92, 107.

This order was an adjudication, final in its nature, of a matter distinct from the general subject of litigation, like a claim to property presented by intervening petition in a receivership proceeding. This distinction was pointed out in Collins v. Miller, 252 U. S., 364, at pages 370 and 371, wherein Mr. Justice Brandeis, delivering the opinion of the Court, said:

"A case may not be brought here by appeal or writ of error in fragments. To be appealable the

judgment must be not only final, but complete, (cases cited) and the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved (cases cited). The seeming exception to this rule by which an adjudication final in its nature of matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without a waiting determination of the general litigation below. *Central Trust Co. v. Grand Locomotive Works*, 135 U. S., 207, 224; *Williams v. Morgan*, 111 U. S., 684, 699; *Trustees v. Greenough*, 105 U. S., 527, has no application here. Nor have cases like *Forgay v. Conrad*, 6 How., 201, 204, and *Thompson v. Dean*, 7. Wall., 342, 345, where decrees finally disposing of property which the successful party was entitled to have carried into execution immediately were held appealable, although certain accounts pursuant to the decree remained to be settled."

(3) Appellants in this Court claim that the form of order in question shows it ^{not} to be final and on page 33 of their brief cite three cases sustaining the proposition that the finality of an order is determined by its form. In these cases the form of the judgment:—that is to say the provisions which these judgments contain, show them plainly not to be final as in each of these cases the matter was *remanded to the Court below for further consideration*.

In the *Hazeltine* case (Receivers' Brief, p. 33) the judgment appealed from reversed a judgment below and *remanded the case for further proceedings*.

In the *Louisiana Navigation Co.* case (*idem*) an appeal was taken from a judgment of the State Court

which had remanded the case to the Court below for a further proceeding.

In the *City of Paducah* (idem) the judgment was in no sense final as shown by the opinion of the Court, in which the following appears.

“An affirmance of the decree by this Court would require that the case be remanded for further proceedings to make the decree final.”

As the final order in the case at bar disposes of all the issues and the entire controversy upon the merits between the Board and the Receivers, the three other cases cited by the appellants at the bottom of page 33 of their brief are not in point.

Clark v. Kansas City (Receivers' Brief, page 33) was an appeal from a judgment of a State Court overruling a demurrer and the Laws of the State permitted an amendment of the pleadings and therefore judgment was not final.

In the *Deslions* case (idem) the appeal was allowed and in the *Rexford* case the judgment decreed a right of possession to one party to the suit *and appointed a Special Master to take evidence*. Such a judgment is interlocutory and not appealable. On the point of finality of the judgment in the *Rexford* case the Court said: (See 228 U. S., 339, 345)

“What we have said of the decree of the Circuit Court shows that it was not final, but interlocutory only. It did not dispose of all the issues and was but a step towards a final hearing and decree. Further proofs were yet to be taken, and not until that was done could the entire controversy presented by the pleadings be adjudicated. *This was recognized by the retention of the case for further orders and by the subsequent reference to a Special Master to take the remaining proofs.* Plainly such a decree is not appealable. If it were

the case could be taken to the Appellate Court in fragments by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of the whole case. * * *

Therefore, these cases cited on page 33 of the Receivers' Brief are not in any way analogous to the case in hand for the reason that the order in question finally disposes of all controversies between the City and the Receivers on the subject matter of the proceedings which involves the right of the Board to rescind the contract of October 29, 1912 in accordance the procedure outlined in its provisions and for the failure of the corporation to construct within the time specified. If the Board has no right to appeal from this order it cannot rescind this contract until and unless the Court below changes its mind.

II.

Even if the District Court had power to restrain the action of the Board the receivers should have proceeded by plenary suit or by ancillary bill and not in a summary manner on petition and rule made in the receivership action.

When the Gas and Electric Securities Company brought its suit in equity *to preserve the assets of the Manhattan and Queens Traction Corporation*, and while its attorneys were drafting the complaint in the main suit, *it and they knew that the City claimed a right to forfeit, and at that time had taken steps to forfeit the franchise contract of October 29, 1912, under which the Manhattan and Queens Traction Corporation was operating.* Yet, with this knowledge, *they did not make The*

City of New York a party to that suit. This they could and should have done.

Immediately after the appointment of the receivers, they undertook, in a *summary* way, by petition and rule *in the main suit*, to prevent the Board of Estimate and Apportionment from compelling, through forfeiture for breaches and defaults *already accrued*, this corporation to carry out its public and contractual obligation to complete its road.

The District Court aided in this purpose by granting a temporary stay and later making such stay permanent during this receivership.

It is submitted, on behalf of the appellants, that the final order ^{of the District Court} ~~appealed from~~ involved what is legally termed an abuse of judicial discretion, because it erroneously and unjustifiably denied the City's right to proceed according to the terms of the contract.

This action of the District Court denied the City a trial of its rights otherwise than upon affidavits, when it is plain that the City appellants required a vive voce trial and the power to cross-examine witnesses for its proper protection, and in this summary way the Court prevented the citizens of the Borough of Queens from the advantages of transportation which they urgently needed and now need.

An action to enjoin the City from forfeiting this contract would be ancillary to the main suit, *but should be brought by ancillary bill and distinct plenary suit.* This injunction order has disposed conclusively and completely of the right of the Board of Estimate and Apportionment to proceed under Section 5, paragraph "Thirteenth," of the Franchise Contract of October 29, 1912.

The consent receivership which now exists will undoubtedly continue for many years, and meanwhile, the

City is without remedy and the people without transportation. The City claims an immediate right to the possession of the property and franchise of this corporation if it fails to complete the construction of its *entire* line, and it is entitled to have this right determined according to the provisions of the Franchise Contract of October 29, 1912.

It has been the *approved practice* of the Federal Courts to proceed in all similar cases by *plenary suit* and *ancillary bill*, rather than in a *summary way* by petition and rule.

In *Blair v. the City of Chicago*, 201 U. S., 400, at pages 449-450, Mr. Justice Day said:

"Without going into further detail upon this branch of the case, we think that the attitude and claims of the City cast a cloud upon the title to this property, which was in the hands of the receivers to be administered under the orders of the Court, and that in such case the receivers may, with the authority of the Court, proceed by *ancillary bill* to protect the jurisdiction and right to administer the property and to determine the validity of the claims of the parties which cast a cloud upon the franchises and rights claimed by the companies and the receivers. . . ."

(See also:

Strickland v. Nat. S. Co., 94 N. Y. Supp. 936;

Wood v. N. Y. & N. E. R. R. Co., 61 Fed. 236).

In *Wheaton v. Daily Telegraph Co.*, 124 Fed., 61, Judge Wallace, in the Second Circuit, *disapproved of the practice* of disposing of claims of third persons, not parties to a suit, by *summary proceedings* in the main action.

The practice of proceeding in a summary way was also disapproved in bankruptcy matters in *Muller v. Nugent*, 184 U. S., 1.

The question whether such summary procedure was correct practice was also raised, but not decided, in *City of Shelbyville v. Glover*, 184 Fed., 234.

In *Lake Shore & M. S. Railway Co. v. Felton*, 103 Fed., 227 (also in the Sixth District, June, 1900), a similar point was raised but not decided. In that case the Court said:

"When the proceeding is taken by a receiver appointed in a suit to which the proposed defendant is a *stranger*, the question whether it should be by bill or petition is one resting to a certain extent in the discretion of the Court, having regard to the particular circumstances. A leading purpose in determining it will also be to afford the defendant full opportunity to assert and obtain the benefit of his defense. Where, as here, the property concerned is already in the possession of the court, and the act complained of is a disturbance of that possession, it is not unusual to allow the receiver to proceed by petition, giving the defendant the opportunity of making defense by answer or other pleading, according to the common course of equity practice. * * * We see no reason for thinking that in the present case any right of appellants could have been compromised by the complaint being preferred by a petition rather than by a bill. They have filed an answer in which they set up the only defense which they claim exists, and the common replication has been filed. It remains to produce the proof, and thereupon a final order or decree can be made upon the merits. *If there was any reason why their rights could not be fully protected in the proceeding which was instituted, the objection should have been made in the court below.* Instead of that, they were content to answer on the merits, submitting to the judgment of the court, without making any suggestion of difficulty or embarrassment. Nor do they raise such a question by the assignments of error, all of which relate solely to the supposed

error of the court in holding that upon the facts shown an injunction should issue. We think that, if the particular mode of obtaining the remedy was mistaken, the defendants have waived the error."

In *Horn v. Pere Marquette R. Co.*, 151 Fed., 626 (Mich, S. D.), February, 1907, was involved incidentally the same question. Judge Lurton, on this point, said:

"1. Objection is made to the right of the receiver to proceed by an intervening petition against the defendant, and, it is said, that he should have sued at law or some other independent suit. This objection, if tenable at all, should have been made by plea, demurrer, or motion. It was not. The defendant came in and answered to the merits. So far as the petition seeks to recover funds actually in the hands of the defendants at date of his appointment, against which a lien in good faith is asserted, the receiver could not have proceeded summarily if objection had been taken in time. The bank might well say:

"'As to that fund, I claim adversely and demand that you proceed in the ordinary way to try the question whether my prior possession can be rightfully disturbed by an order in a case to which I was not a party.' *Wheaton v. Daily Telegraph Co.*, 124 Fed., 61, 59 C. C. A., 427."

Judge Chatfield, of the Eastern District of New York, had previously exercised summary jurisdiction by petition and rule, to preserve the property of the South Shore Traction Company while it was in the possession of receivers appointed by him. (See *Brady v. South Shore Traction Company*, 197 Fed., 669).

It is therefore submitted to this Court that the receivers of the Manhattan and Queens Traction Corporation should have proceeded against the City, if at all, by *plenary suit* and *ancillary bill* and that it was an *abuse of discretion* on the part of Judge Chatfield to enjoin

action on the part of the Board of Estimate and Apportionment in a summary way by petition and rule.

III.

The Court had no equitable right to restrain the Board from acting under the provisions of Section 5, paragraph "thirteenth" of the contract of October 29, 1912, as amended on January 21, 1916, and for the reasons in this point set forth, to wit:

(a) Paragraph "Thirteenth" above referred to was legal and enforceable, was required by the City Charter to be inserted in the contract and gave the City the right to forfeit the contract.

This paragraph was drafted in conformity with the provisions of the Greater New York Charter.

Greater New York Charter, Chapter 378, of the Laws of 1897, as amended by Chapter 466 of the Laws of 1901 and 629 of the Laws of 1905, Section 73. (P. 197 hereof).

This section reads in part:

"Every grant shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates * * *."

The power of a municipality to grant a conditional consent to a railroad has been repeatedly upheld.

Matter of Quinby v. Public Service Commission, Second District, 223 N. Y., 244, 259.

Such a condition is in the nature of a condition subsequent and if not fulfilled the consent may be revoked.

Matter of International Railway v. Public Service Commission, Second District, 226 N. Y., at page 474. Judge Cardozo, in this latter case, said:

"The consent may be absolute or it may be subject to a condition The condition if it touches the future operation of the road has the force of a condition subsequent and if its terms are not fulfilled the consent may be revoked" (page 481).

(Numerous cases are cited by Judge Cardozo to sustain this proposition, including *Matter of New York Electric Lines v. Empire City Subway Company*, 235 U. S., 179, 194).

What The City of New York and its Board of Estimate sought was to compel the construction and operation of the railway by this corporation in compliance with its franchise contract and in order to meet and satisfy the demands of the people for transportation facilities in that section of the Borough of Queens through which the lines of this company should have been built and in case the company found it impossible to build and operate to have other facilities supplied to accommodate the people.

(b, c) The passage of the proposed resolution would have been a legislative act and the Court was without jurisdiction to prevent such passage.

The Board of Estimate and Apportionment, in attempting to act on the failure of the company to construct and operate, was exercising legislative power of the State delegated to it by Chapter 629 of the Laws of 1905; secs. 10, 11. The act transferred so much of the legislative power that had been by Chapter 378 of the

Laws of 1897, as amended by Chapter 466 of the Laws of 1901, conferred on the Board of Aldermen or Municipal Assembly to the Board of Estimate and Apportionment of The City of New York.

In *Wilcox v. McClellan*, 185 N. Y., 9, at p. 17, O'Brien, J., said:

"It was therefore competent for the legislature by the acts in question to specify the particular body or board that should be deemed to have control of the streets within the meaning of the Constitution, and in this case it has designated for that purpose the Board of Estimate and Apportionment. There is nothing in the Constitution to prevent the legislature from making such a designation, or from changing it from time to time as the public interest may require, and that is substantially what the legislation in question seeks to accomplish. * * * If in the judgment of the legislature the Board of Estimate and Apportionment was the proper body to entrust with the granting of franchises, we are unable to see wherein any right of the Board of Aldermen or of any other officer or individual has been unduly invaded."

The power of granting and repealing franchises thus transferred from the Board of Aldermen or Common Council to the Board of Estimate and Apportionment was part of the power of the legislative body of the City. It had been held by the State court that the body representing the City empowered to grant or repeal franchises *was the body possessing legislative power*. This principle was established in *Ghee v. Northern Union Gas Co.*, 158 N. Y., 510, 512, 516, where Chief Justice Parker said:

"During all that period of time and until the enactment of the Greater New York Charter by Chapter 378 of the Laws of 1897, the common council of cities having local and limited legisla-

tive authority has been recognized and held to be the municipal authority whose consent is required by the statute we have referred to. . . .

Now the foundation for these decisions and this concession is that the municipal authorities, within the meaning of the Transportation Corporations Act, consisted of the body in each municipality in which was vested the local legislative authority, and from the date of the Dongan Charter . . . the common council has been the only local body authorized to legislate in behalf of The City of New York. The Charter of 1857 provided: 'The legislative power of the said corporation shall be vested in a board of aldermen and a board of councilmen, who together shall form the common council of the City of New York. . . . , , ,'

Eugene McQuillin, in his work on Municipal Corporations, lays down the rule of law on this subject as follows:

"In granting a franchise to a street railway company to use the streets of a municipality, it acts in a purely governmental capacity and this is equally true as to the repealing of a franchise to use the streets."

Vol. VI, sec. 2632, citing *Edison v. Olathe*, 81 Kan., 328, 331; 105 Pac., 521.

Again he states:

"The exercise by a municipality of its laws making power ordinarily will not be restrained or interfered with by a court of equity. Hence, as considered in a prior volume, the passage of an ordinance or resolution within the scope of the corporate powers will not be restrained by injunction, except perhaps in cases where the mere passage of an ordinance or resolution beyond the scope of the corporate power, without any action or attempt to enforce it, would instantly produce irreparable

injury * * * but the fact that the legislative action may be in disregard of constitutional restraints and impair the obligation of a contract does not authorize the Court to restrain the passage thereof by injunction. The proper remedy in such cases is by injunction to prevent the execution or enforcement of such action."

Vol. V, sec. 2503, citing *State ex rel. v. Superior Ct.*, 105 Wis., 651; 81 N. W., 1046; 48 L. R. A., 819;

New Orleans Waterworks Co. v. New Orleans, 164 U. S., 471, and numerous other cases.

This author also states:

"The enactment of ordinances is a governmental function as is the enforcement thereof."

Vol. VI, sec. 2631, citing *Jones v. Williamsburgh*, 97 Va., 722; 34 S. E., 883; 47 L. R. R., 294.

Again we find this statement at p. 1532 (Sec. 705):

"Ordinarily the passage of an ordinance is a legislative act which as a rule a court of equity will not enjoin. The general assembly is a co-ordinate branch of State government and so is the law-making power of municipal corporations within the prescribed limits. *It is no more competent for the judiciary to interfere with the legislative acts of one than the other.* But the unconstitutional acts of either may be annulled."

(See numerous cases cited from various States.)

A like rule is laid down by Dillon in his work on *Municipal Corporations* [5th ed.], Vol. II, sec. 523. His statements of the law is as follows:

"The courts will not, as a rule, enjoin the passage of unauthorized ordinances of a legislative character, *and will ordinarily act only when steps are taken to make them available.* A court of equity cannot properly interfere with, or in advance restrain the discretion of the municipal body, while it is in the exercise of statutory or charter powers that are legislative in their character. But the courts have jurisdiction at the suit of a taxpayer on behalf of the city, or at the suit of a party specially damaged by the passage of the ordinance, or whose private rights or property are affected thereby, to restrain the enforcement of *ultra vires* and invalid ordinances and regulations."

(See numerous cases cited under this paragraph.)

It appears from the foregoing text that the weight of authority and the tendency of the more recent decisions are in favor of the position that the restraining power of the Court should be directed against the enforcement rather than the passage of unauthorized orders and resolutions, or ordinances by municipal corporations.

All acts and resolutions of the Board of Estimate and Apportionment, passed under authority of Chapter 3, Title I, sections 72, 73 and 74 of the Greater New York Charter, as amended, have the same force and effect as legislative acts. By these sections the Legislature has regulated the granting of City's constitutional consent under article III section 18 of the state constitution (page 175 hereof) for the construction and operation of a railroad by the Board of Estimate and Apportionment along the streets of The City of New York. This consent is of a governmental and legislative character as well as of a constitutional character.

Matter of International Ry. Co. v. Road, 226 N. Y. 474).

Whenever a representative body of the City acts under expressly delegated authority from the Legislature to do an act which is purely legislative in character, such act is itself legislative and has the full force and effect of a legislative act.

City of New York v. Foster, 148 App. Div. 258, aff'd. 205 N. Y. 593.

The adoption of a resolution under the propisions of Sec. 5, paragraph "thirteenth" of the contract of October 29, 1912, would be legislative action and any such resolution would be a law in contemplation of Article 1, Section 10, of the Constitution of the United States and the 14th Amendment thereof which may not be restrained by the courts.

This is made plain by the well reasoned opinion of the Court by Taft, Circuit Judge, in *Iron Mountain R. Co. vs. City of Memphis*, 96 Fed. Rep., 113, at page 126, where it is said:

"We come, then, to the question: Did this resolution violate that part of section 10, art. 1, of the Constitution of the United States, declaring that 'no state shall . . . pass any . . . law impairing the obligation of contracts'?"

First. Was the resolution a law of the state within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution if it impairs the obligation of a contract. *Murray v. Charleston*, 96 U. S. 432; *U. S. v. New*

Orleans, 98 U. S. 381, 392; *Meriwether v. Garrett*, 102 U. S. 472; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77. If such ordinance is administrative, rather than legislative, then it is not within the constitutional inhibition, even though it impairs the obligation of a contract. *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741. The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance. It concerned the occupancy of the streets, which, as we have seen, the legislative council controls under delegated authority from the state legislature as an agency of the state and a trustee for the public at large. It purported to find and adjudged the ground to exist for declaring a forfeiture of a grant of an easement and a franchise in the streets which the legislative council as the agent of the state had made, and it exercised the option reserved to it in the grant of insisting upon such grounds as a forfeiture unless the grantee within 50 days should change its course of conduct. It is conceded that the grantee did not change its course of conduct, and that the resolution has become operative by its terms, if it can have any efficacy to effect a divestiture of title. Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not of itself divest title and right of possession, but the power is in the sovereign, as grantor, to manifest his will that the condition shall be enforced, and this manifestation of his will is by legislative action. In this case the condition expressly requires that the council should exercise an option before forfeiture should ensue. In exercising such an option, the council is acting in a legislative capacity. • • •

In *U. S. v. Repentigny*, 5 Wall. 211, 268, it was said, 'The mode of asserting or of assuming the

forfeited grant is subject to the legislative authority of the government.' See, also, *Farnsworth v. Railroad Co.*, 92 U. S. 49, 66; *Van Wyck v. Knevals*, 106 U. S. 360, 368, 1 Sup. Ct. 336; *Railroad Co. v. Mingus*, 165 U. S. 413, 17 Sup. Ct. 348. *An examination of these cases makes it entirely clear that a declaration of a forfeiture of a public grant for condition broken is legislative in its character.* It is not conclusive, of course, of the facts asserted, and may be judicially resisted (see *Railroad Co. v. Mingus*, 165 U. S. 413, 434, 17 Sup. Ct. 348); but, if the condition in fact has been broken, it operates to divest the title and the right of possession. *The resolution in question was a declaration enacted in form of law by the legislative council, a state agency, vested with legislative authority over the streets, by which, if valid, the title of the city and state and public in the streets granted to the complainant was divested from it, and revested in the grantors. Clearly, the resolution was and is a law of the state within the meaning of the constitution.* It is contended that it cannot be a law, because it does not declare a present forfeiture, but only a future one, contingent on conduct of the grantee. We do not think this feature of the resolution deprives it of its legislative character. The operation of laws is frequently postponed to a future day, and made to depend on a contingency. When, as is conceded in the present case, the time of suspension is passed, and the contingency has happened, they are as efficacious as if they had contained no conditions. *This resolution found and adjudged a condition to be broken, and declared that the council exercised its option to declare a forfeiture and to resume possession if the breach continued 50 days. The conduct declared by the council to be a breach, it is conceded, has continued and the declaration of forfeiture has become operative.*

There are many cases in which the supreme court has declared a city ordinance to be a law

within the contract clause of the constitution which have much less of legislative character than public forfeitures of rights in the streets by municipal legislatures. Such a case is that of City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77."

It must be noticed that this case was brought to annul the resolution of the legislative body of Memphis and prevent action thereunder. This phase of the action is referred to by appellants on page 176 of their brief.

There are numerous other Federal authorities to the same effect. See *Mercantile Trust and Deposit Company of Baltimore v. Collins Park & B. R. Co. et al.*, 99 Fed. Rep. 812, 821; *Missouri & K. I. Ry. Co. v. City of Olathe*, 156 Fed. Rep. 624, 628, 632, 634; *City of Des Moines, Iowa et al., v. Des Moines Gas Co.* 264 Fed. Rep. 506; *Wright vs. Nagle* 101 U. S. 791, 794; *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 265, 266; *City Ry. Co. v. Citizens R. R. Co.* 166 U. S. 557, 563; *Penn. Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 694; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 7, 8, 9; *McChord v. Louisville and Nashville R. R. Co.*, 183 U. S. 483, 502.

In *New Orleans Water Works vs. New Orleans*, 164 U. S. 471, at pages 481 and 482, on this subject, Mr. Justice Harlan said:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot

be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted have the force of laws passed by the legislature of the State and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. *The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin.* *Chicago v. Evans*, 24 Illinois, 52, 57; *Des Moines Gas Co. v. Des Moines*, 44 Iowa 505; 1 Dillon on Mun. Corp. §308, and notes; 2 High on Injunctions, §1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. *Page's case*, 34 Maryland, 558, 564; *Baltimore v. Radecke*, 49 Maryland, 217, 231.....

The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it acts."

In *Missouri & K. I. Ry. Co.* case, *supra*, the Court said:

"I have no doubt as it stands admitted by the record complainant had fully performed and had not breached its contract with the city; that such repealing ordinance, if passed would impair the obligation of the contract between complainant and the city, and would deprive the complainant of its property rights therein without due process of law in violation of the provisions of the federal constitution, and that this court has the power and jurisdiction to restrain the doing of the threatened act unless, as further contended by the city, the act threatened is in its very nature such that courts of equity will not restrain." (Citing numerous cases) • • •

"It follows from what has been said, the full scope, object and purpose of the bill in this case being to secure *injunctive relief against the exercise of a legislative function—the consideration and passage of the repealing ordinance in question—such relief cannot be afforded complainant in this suit.*"

In *City of Des Moines* case, *supra*, the Court said:

"The city was enjoined from enforcing, not only that ordinance, but also any other ordinance fixing a rate less than \$1.10, with an additional 10 cents for delay in payment, or fixing the quality of the gas to be furnished at any other or greater standard than 560 standard British thermal units per cubic feet. Doubtless the Court was of the opinion that, while the latter rate would be compensatory, any less would not be so; but the matter in controversy was the ordinance in existence and the 90-cent rate. *The prescribing of rates for public service corporations is essentially a legislative function. The judicial function attaches when rates which have been prescribed are challenged as confiscatory. The court should not*

anticipate legislative action and fix its limitations for the future. New Orleans Water Works vs. New Orleans, 164 U. S., 471, 17 Sup. Ct. 161, 41 L. Ed. 518. It cannot be assumed in advance that the city might adopt other ordinances the enforcement of which would deprive the company of a reasonable return for the employment of its property in the public service."

Decisions of the Courts of the States are to the same effect—*Peo. ex rel. Rockwell v. Chicago Tel. Co. et al.* 91 N. E. 1065; 245 Ill. 121; *Bd. of Commrs. of Marion County et al. v. Jewett*, 110 N. E. 553; 184 Ind. 63; *Chicago R. I. & P. Ry. Co. v. City of Lincoln et al.*, 124 N. W. 142; 85 Neb. 733; *Slade v. City of Lexington*, 121 S. W. 621, (not reported in State Reports); *Garrity et al. v. Halbert, Mayor et al.*, 225 S. W. 196, 198; *Pfeifer et al. v. Graves, Secretary of State*, 104 N. E. 529; 88 Ohio St. 473, 533; *Rudolph et al. v. Hutchinson, Mayor*, 114 N. W. Rep. 453; 134 Wis. 283; *Ewing v. City of Seattle (Seattle Elec. Co., Intervenor)*, 104 Pac. 259, 263; 55 Wash. 229; *Majestic Theatre Co. et al. vs. City of Cedar Rapids et al.*, 30 Amer. & Eng. Ann. Cases, 93; 153 Ia. 219.

In *Ewing v. City of Seattle*, 104 Pac. 259, 263, the Court reversed an order of the Superior Court of Washington for the reason that the acts of the legislative authority of the City attempting to be enjoined were purely legislative, and, therefore, the courts had no lawful authority to enjoin them.

In *Pfeifer v. Graves*, 104 N. E. 529, the Appellate Court of Indiana refused to enjoin action on the part of the Secretary of State for the reason that any such injunction would be interfering with State legislation. On this point (p. 533) the Court said:

"There is another indisputable and imperative reason why the remedy they invoke must be denied. We cannot intervene in the process of legislation

and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment, of its own constitutional powers."

In *Garrity v. Halbert*, 225 S. W. 196, the Court of Civil Appeals of Texas refused to enjoin the enactment of a city ordinance, valid or invalid, the Court saying at page 198:

"To say the least the great weight of authority supports the view *that a court of equity will not interfere with the strictly legislative processes of a municipal corporation*, even where it is alleged that they are unconstitutional and void; but on the other hand equity will restrain the hurtful exercise of unlawful power granted to administrative and ministerial officers by void ordinances, or the doing of any act injurious to a complainant under such circumstances."

In *Slade v. City of Lexington*, 121 S. W. 621, the Court of Appeals of Kentucky laid down the rule that a city council may not be enjoined from passing an ordinance defining and granting a franchise, such an ordinance being an exercise of legislative function; the remedy being by proceedings against the enforcement of the ordinance. On this point (p. 622) the Court said:

"The legislative power of the city is vested in the council, and within its sphere the council is entitled to the same respect from the courts as the state legislature would be in a matter within its jurisdiction. The courts will refuse to carry into effect a void ordinance, *but they will not entertain jurisdiction to enjoin the council from considering a matter within its jurisdiction.*"

In *Chicago R. I. & P. Ry. Co. v. City of Lincoln, et al.*, 124 N. W. 142, the Court stated that it would not enjoin the passage of an alleged unauthorized resolution or

ordinance by a municipal corporation and stated that an injunction should not issue in such a case until some effort is made to enforce such resolution or ordinance. On this point the Court said (p. 143):

“We find the general rule to be that a municipal corporation in the exercise of legislative power in relation to the subjects committed to its jurisdiction can no more be enjoined that the legislature of the state.”

In *Olim v. State*, 110 N. E. 553, the Supreme Court of Indiana held that the right of the general assembly to act without interference by judicial interposition exists where justified by ample constitutional authority or not and it is immaterial that the Legislature has sought to delegate its legislative authority; for, when sought to be exercised by the body to whom it is delegated, it is none the less a legislative function. At this point (p. 555) the Court said:

“When such delegation of power legislative in its nature has been made or assayed, its exercise by the body upon which it is, or is attempted to be, ~~be~~ is deemed as free from judicial control as though it were attempted by the legislature itself. The right of the courts to intervene arises after the exercise of the legislative function is accomplished and a question of the validity of the action is presented in some justiciable controversy.”

In *Majestic Theatre Co. v. City of Cedar Rapids*, *Amer. & Eng. Ann. Cases*, Vol. 30, 153 Ia. 219, the Court held that an injunction will not lie to restrain a city council from passing a city ordinance and imposing a punishment by fine or imprisonment, though the ordinance if passed would be invalid. At page 94 the Court said:

"It is first said that, if a proposed ordinance would be void as an *ultra vires* enactment, then its passage by the city council may be enjoined. No authority cited recognizes or sustains the rule as thus broadly stated. Indeed, *it may be said that the courts will, under no circumstances, attempt to enjoin the exercise of the strictly legislative functions of a city council.* This is somewhat more than a rule established by precedent. *It is a constitutional limitation of judicial power.*"

The New York authorities are to the effect and hold that municipal ordinances granting or repealing franchises are legislative.

City of Buffalo vs. N. Y. L. E. & W. R. R. Co., 152 N. Y., 276; Beekman v. Third Ave. R. R. Co., 153 N. Y., 144, 152; Weston vs. City of Syracuse, 158 N. Y., 274, 288; Peo. ex rel, W. S. El. Co. vs. C. T. & E. S. Co., 187 N. Y., 58, 65; City of New York vs. Bryan, 196 N. Y., 158, 165; Peo. ex rel. Southshore T. Co. vs. Willcox, 196 N. Y., 212; Peo. ex rel. City of New York vs. N. Y. R. Co., 217 N. Y., 310; City of New York v. Foster, 148 App. Div. 258; aff'd 205 N. Y. 593.

In the *City of Buffalo* case the Court said at page 280:

"Municipal ordinances passed in pursuance of authority from the legislature have the force of law and are as obligatory as if enacted by the legislature itself."

In the *Beekman* case, at page 152, the Court said:

"The authority to make use of the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source, whatever may be the

agencies through which it is conferred. The use or occupation of the streets for such purposes, without the grant or permission of the state through the legislature, constitutes a nuisance, which may be restrained by individuals injuriously affected thereby. (*Fanning v. Osborne*, 102 N. Y., 441)."

In the *Weston* case, at page 288, the Court said:

"So, too, the legislature may confer upon common councils of cities authority to pass municipal ordinances. Such as are passed in pursuance of such authority have the force of law, and are as obligatory as if enacted by the legislature itself."

In the case of *Peo. ex rel. W. S. El. Co.*, the Court said at page 65:

"We are of opinion that the Board of Aldermen were in 1896 the municipal authorities contemplated by the language which has been quoted from the Transportation Corporations Law. The giving of the consent prescribed by that statute is the grant of a franchise. The act of 1887 conferred no express power to grant such a franchise upon the board of electrical control nor are we able to discover that it was conferred by implication."

In *City of New York vs. Bryan*, at page 165, the Court said:

"But the consent of the municipal authorities was not the grant of an independent franchise like the deed from the owner where the railroad runs through private property. Not only the franchise to be a corporation, but the franchises granted to a corporation when formed, spring from the state. It is the elementary definition of a franchise that it is a grant from the sovereign power. (3 Kent's *Cofm.* 458; *Fanning v. Osborne*, 102 N. Y., 441.) In *Beekman v. Third Ave. R. R.*

Co. (153 N. Y., 144, 152) this Court said: 'The authority to make use of the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a franchise, must always proceed from that source, whatever may be the agencies through which it is conferred.' "

In *Peo. ex rel. City of New York*, at page 315, the Court said:

"A railroad can be constructed and operated upon a public street or highway only upon the consent of the people acting through the legislature. The title to the streets and highways, whether in the people or a municipality or in fee or in easement, is held for the public use. The fee of the streets acquired by the City of New York is held by it in trust for the use of all the people of the state and not as a corporate or municipal property."

The 4 New York cases cited by Appellants on page 171 of their brief are not in point.

These cases have to do with the acts of the *Common Councils* of the old City of Brooklyn and New York at a time when these legislative bodies of these cities had not been granted by the State Legislatures either expressly or by implication the authority to grant franchises. If the act of such a body be *ultra vires* it cannot be legislative.

Hamilton Gas Light Company v. Hamilton City,
146 U. S., 258.

Appellants, in their brief, at page 171, state that the act of granting a franchise by a municipal corporation in the State of New York has been authoritatively de-

terminated not to be a legislative act and not to be free from the injunctive power of a court of equity, and in support of this contention, cites:

Negus v. Brooklyn, 62 How. Pr. (N. Y.) 291;
People v. Sturtevant, 9 N. Y., 263; 59 Am. Dec. 536;

People v. Dwyer, 90 N. Y., 402;

Milhau v. Sharp, 15 Barb. (N. Y.) 193.

THE ABOVE CASES DO NOT SUPPORT THE CONTENTION OF APPELLANTS. They have to do with resolutions of the common council of the ^{city} passed at a period when the cities of this state had no legislative authority to grant franchises.

The *Negus vs. Brooklyn* and *People vs. Dwyer* cases (*supra*) are different phases of the same case or transaction. These cases concern the old *city of Brooklyn*, now Borough of Brooklyn, City of New York.

The decision in the *Negus* case was a Special Term decision made in *December, 1881*, on a motion to continue an injunction enjoining the Common Council of the City of Brooklyn from passing, over the Mayor's veto, a resolution *changing the route of the Brooklyn Elevated Railway Company*.

This Railway Company was chartered by *Chapter 585 of the Laws of 1874* of the State of New York, for purpose of constructing and operating an elevated railroad from the Brooklyn end of the East River Bridge to ~~Woodhaven~~, in Queens County. *The Charter designated the route of this railway through certain streets and avenues of the City of Brooklyn, being a single line of road, and at the end of the description, added:*

"or on such other streets and avenues as may be named by the mayor and common council of the city of Brooklyn as being more suitable for carry-

ing out the objects contemplated in the erection of said elevated railway''.

On the 6th day of December, 1881, on application of the company, the Common Council adopted a resolution naming *other streets* and avenues as being more suitable for the carrying out of the objects contemplated.

On the adoption of this resolution it was, on the 7th day of December, sent to the Mayor for his approval, but the Mayor returned the same on the 17th day of December to the Common Council, disapproved by him. Thereupon, Negus, claiming that the Common Council intended and threatened to pass the said resolution over the Mayor's objections, commenced an action against the City of Brooklyn, the Brooklyn Elevated Railway Company and its Receivers, to restrain them, among other things, from passing the resolution or from acting thereunder.

At the commencement of the action, an order was obtained from the *County Judge* of Kings County, requiring the defendants to show cause on the 28th day of December, 1881, at a Special Term of the Supreme Court, why an injunction should not be granted until the hearing and decision at the motion and enjoining the City of Brooklyn and the Common Council from *passing any resolution altering or changing the route of the Brooklyn Elevated Railway* from that designated in the Charter, or from doing any act to over-ride the veto or disapproval by the Mayor of the resolution aforesaid.

The summons, complaint and injunction order were served on the Mayor and each individual alderman, on the 27th of December, 1881. The motion to continue the injunction was argued on the 28th day of December, 1881, the aldermen appearing by counsel and the decision being reserved.

After service of the injunction on the 27th, the Board of Aldermen, being the Common Council, adjourned from day to day until the 31st day of December, on which day they met, and after some delay, they took the resolution in question from the table, and under the previous question, passed and adopted the same, notwithstanding the objections of the Mayor.

It will be noticed that the Act of May 26, 1874 (Chapter 585 of the Laws of 1874) gave the right to name *other streets* than those mentioned in the charter of the company ~~in~~ the *Mayor*, as well as the Common Council.

The Court, at Special Term, in deciding this case, held that the acts imposed on the *Mayor* and Board of Aldermen by Chapter 585 of the Laws of 1874 were ministerial in their nature and that the *Common Council*, in granting its consent, was a *mere agent of the City*, and with defined and limited powers. The Court further said:

“The decisive questions, therefore, are:

1. Whether the common council can exercise the power claimed, assuming its existence, in the mode adopted by them? And,

2. Whether the power originally granted is still in force? Both questions must, I think, be answered in the negative. The power does not fall under part of the mass of legislative powers which have been delegated to the common council by the City Charter, but is a *special authority* conferred upon the *mayor* and *common council* by the *statute incorporating the railroad company*.
• • •

The statute plainly requires the *consent of both*. The unanimous consent of the common council would not be an effectual execution of the power, much less would the consent of two-thirds of the members thereof, however manifested. Nor was the exercise of the power committed to a single board composed of the mayor and common

council. But if such was its nature, it could be exercised only upon a meeting of all or a meeting of a majority upon due and timely notice to the others. * * * Upon either view of the subject, the proposed action of the common council would be illegal. *I am also clearly of opinion that the power has ceased to exist.*"

The question involved in this case was again brought before the June Term of the Supreme Court of the State of New York, Second Department, in September, 1882, sub nomine People of the State of New York ex rel. John D. Negus, Respondent, vs. William Dwyer, Appellant (27 Hun, 548), which was an appeal from an order made at Special Term, *adjudging appellant guilty of contempt* in passing the resolution mentioned in the case of Negus vs. the City of Brooklyn. The order adjudging the defendant in contempt was affirmed.

This case was carried to the Court of Appeals (see The People ex rel. John D. Negus, Respondent, vs. William Dwyer, Appellant^{NT}, 90 N. Y., 402) and the same contention was made to wit:—that only the old City of Brooklyn had been made a party to the suit below; and as the aldermen were acting as the *agents of the State* and *not of the city*, they could not be punished.

The order of the General Term was affirmed by the Court of Appeals, Finch, J., saying:

"The State might have dictated the route and selected the streets absolutely and peremptorily, but it chose not to do so, and gave to the city the privilege, through its regular and constituted agents, of changing the streets to be occupied. When the mayor and common council acted upon this privilege, it was in performance of a municipal duty, one due the city alone, and not at all to the State. *The latter had acted and was contented.* It named the streets for itself, and then practically said, if the mayor and common council,

having in view the welfare and convenience of the city and its inhabitants, deemed that such welfare and convenience will be promoted by substituting other streets, they may do so. *When these authorities came to act, or declined to act, their sole duty was to the municipality which they represented.* Its welfare and convenience was the only motive which could rightfully set them in motion, and dictate and determine the character of their action. When they spoke the city spoke, and they necessarily acted for the city and in its behalf”

The Court then takes up the claim of the appellants that the act was a legislative act and discretionary, and on this point says:

“But it is further said that the act enjoined was a legislative act and discretionary, and the court had no jurisdiction to prohibit it. *But it had jurisdiction of the subject-matter of the action, as well as of the parties.* ‘That public bodies and public officers may be restrained by injunction from proceeding in violation of law to the prejudice of the public or to the injury of individual rights cannot be questioned.’ (The People v. The Canal Board, 55 N. Y. 393; Davis vs. American Society, etc., 73 id. 369.) *Whether the act sought to be enjoined was or was not of a legislative character was a judicial question, to be disposed of by the court, acting upon the facts, and it could prohibit action until it could investigate and finally decide the question.* (People v. Sturtevant, (9 N. Y., 274.) If the court erred in its conclusion the remedy was by appeal, not by disobeying its mandate. While it is true that equity will not ordinarily interfere with matters resting largely in the discretion of municipal authorities, yet where the threatened action will produce irreparable injury, and consists in a disposition of the public property by devoting it in part at least to the uses of a private corporation, or where an

illegal grant is threatened, or the action attempted is corrupt and fraudulent and an abuse of trust, cases are not wanting to sustain an interference by injunction. (High on Inj., §403; *People v. Sturtevant*, *supra*; *People v. Mayor*, 32 Barb. 102; *Blake v. City of Brooklyn*, 26 id. 301)."

It will be plainly seen, then, that the decision of this case turned on the question whether or not the power of consent bestowed on the Common Council and Mayor by Chapter 574 of the Laws of 1884, was merely administrative or ministerial as was held, following *People vs. Sturtevant*, 9 N. Y., 274, that whether or not the act was legislative, the Court had jurisdiction to determine that fact and grant a temporary stay until it had so determined, *and that violation of such a temporary injunction, or stay, until the decision of the Court may be punished as a contempt*. The Court pointed out the fact that the *Legislature had granted the franchise* and that the only power bestowed upon the Mayor and the Aldermen *was a right to change the streets mentioned in the charter of the company*. This was merely a ministerial act.

These cases only decided that disobedience of an injunction such as that issued in the case at bar could be punished as a contempt of court. No such question is present in the instant case as the Board obeyed the injunction. These decisions, however, are to the effect that the courts of this state could not restrain a purely legislative act of the local legislative body of the city.

The other two cases mentioned by Appellant, namely, *Milhan v Sharp*, 15 Barb. N. Y. 193 and *People v. Sturtevant*, 9 N. Y. 263 involve a like subject matter, namely, the validity of a resolution of the Board of Aldermen of the old City of New York, reading in part:

"RESOLVED, That Jacob Sharp, Freeman Campbell [and 28 others who are named in the resolu-

tion,] and those who, for the time being, may be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the common council to lay a double track for a railway in Broadway and Whitehall or State-street from the south ferry to 59th-street. * * *

This resolution is set forth in full in 1 Duer's Reports (N. Y. 464). At the time of the passage of this resolution, the common council of this City had not received by express or implied provision of law power to grant franchises for railroad purposes in the city streets.

The common council attempted to grant such a franchise under its *right as trustee of the streets* for public uses and claimed that the proposed grant was a mere license. That a franchise attempted to be granted for the construction and maintenance of a railroad in the city street was void and clearly beyond the powers of Common Council was held in *Davis v. Mayor*, 14 N. Y. 506 and *Milhau v. Sharp*, 27 N. Y. 611. *Both these cases were brought to annul the above resolution and to prevent the construction of a railroad under it by Sharp and his associates. The following are the facts touching such resolution:*

On the 19th day of November, 1852, the Board of Aldermen passed the resolution above quoted in part. On the 6th day of December, 1852, the resolution was also passed by the Board of Assistant Aldermen was sent to the Mayor for his approval. On the 18th day of December, 1852, the Mayor returned the resolution with his objections to the Board. The effect of this veto of the Mayor was that the Board of Aldermen could not proceed to reconsider the resolution before December 29, 1852. *On the 27th day of December, Judge Campbell of the Superior Court, upon an ex parte application*

issued an injunction against the Mayor, Aldermen and Commonalty of The City of New York commanding them to desist and refrain from granting to, or in any manner granting to Jacob Sharp and others *the right, liberty or privilege* of laying a double track of railroad in Broadway in said City and directing that they show cause at special term in the month of *January, 1853*, at the opening of the court why the injunction order should not be made permanent.

On the 28th day of Decemebr, 1852, the injunction was served upon the Mayor and some of the members of the Board of Aldermen. On December 29, 1852, the Board of Aldermen and on December 30, 1852, the Board of Assistants by votes of a majority of their respective members passed the resolution notwithstanding the injunction.

A motion for an attachment against a *Mr. O. W. Sturtevant*, one of the aldermen of the City for an alleged contempt of court for disobeying this injunction came on in the Superior Court before Mr. Justice Duer who held *Mr. Sturtevant guilty of contempt*. The defendant set up that the adoption of the resolution was a legislative act for which he could not be punished and the court took the view that the aldermen were not legally acting in a legislative capacity while passing the resolution. The Court said at page 497 (1 Duer's Reports):

"Notwithstanding these observations, the question still remains, has this court, or any court of equity, the power to interfere with the legislative discretion of the Common Council of the city, or of any other municipal corporation? **And to this question I at once reply, certainly not**, if the term discretion be properly limited and understood; and thus understood, I carry the proposition much further than the counsel who advanced it."

The Court however held that the Board was *not acting in a legislative capacity as it had received no power to make a grant for railroad purposes from the Legislature* and the fact that they were trustees of the public highways did not give them the right to make a *grant or deed*, to private persons or individuals for railroad purposes.

This case was carried to the Court of Appeals *sub nomine* (People 1. Sturtevant, 9 N. Y. Rep. 263) where it was held that the contempt order was properly made *as the Court had a right to inquire whether the proposed adoption of the resolution would be a legislative act or not* and until such decision the court had a right to restrain the passage of the resolution by the Aldermen the court saying the question of jurisdiction does not involve the inquiry *whether the case made out by the complaint entitled the plaintiff to relief, but only whether the court had power to decide whether it entitled them to relief or not*. On the contention of Mr. Sturtevant that the act was legislative, the Court said:

"A satisfactory answer to this position is, that the act in question in this case was not in any just sense an act even of municipal legislation. *It is true that it took the form of a resolution, but in substance it was a grant upon condition; and even if immunity belongs to municipal legislation, it cannot be that by giving to an act not legislative the form of an ordinance or resolution, the jurisdiction of the courts can be defeated.*"

The Court of Appeals considered the adoption of the resolution by the Board, in the absence of legislative authority to grant a franchise, nothing more than the grant of *an easement or deed of a property right* in the public highway and held that the Mayor and Aldermen had been given *no legislative authority to make such a grant or deed*.

This resolution was also subject to litigation in *Milhau v. Sharp*, XV Barb, Supreme Court Reports, (N. Y.) 193. This action was brought by John Milhau and others, abutting property owners on Broadway to *prevent the construction of the road by Sharp and others* under the above-mentioned resolution of the common council. A perpetual injunction was granted at Special Term of the Supreme Court restraining such construction and the matter came on before the New York General Term of the Supreme Court *April 4, 1853, and the court sustained the injunction below on the ground that the common council had been granted by the Legislature no power whatever to grant franchises for railroad purposes in the public streets.* In this case, Judge Duer's decision is criticized and on the question of the right of the court to restrain a legislative body Mr. Justice S. B. Strong, said:

“The adoption of ordinances or resolutions for the improvement of the streets is nowhere declared to be an executive duty, but is the exercise of a power devolved upon the common council in *its legislative capacity.* The resolutions making the grant in question had reference to the improvement of Broadway as a street, were pending before the common council when the injunction was issued, and that process, if effectual, would necessarily have interrupted, and eventually prevented, legislative action. I can find no warrant for this interference, either in any legislative enactment or judicial determination. *It is a familiar principle that legislative action is not subject to judicial control. This results from the distinct nature of the duties of the two departments and their co-ordinateness.* Judges are elected or appointed to administer the laws, not to make them, or to interfere in their enactment. They formerly had a voice in their final passage in the council of revision in this state, but their interference was at length deemed inexpedient and improper, and the

council was abolished. To interfere during the pendency, and before the passage, of a bill in either branch of the legislature, would be still more objectionable on every account. Legislative action, to be worth anything, should be free. I do not understand that this principle is denied as applicable to our state legislature, but it is said that it does not extend to our municipal corporation. Why not? The delegation is of a part of the sovereign power, and that must pass with its inherent immunities, unless there is an express or otherwise necessary limitation."

If it should be said the consideration of these resolutions by either board was not prohibited, but that the restraint was only upon their adoption, the difficulty would not be answered. It would then seem that either board might deliberate upon them, and a vote might be taken, but that the members were restricted to voting only against them. This would be placing any member of the board who might consider that the resolutions ought to be adopted, in an unfortunate predicament—should he vote for them he would violate the injunction and put his body in peril of imprisonment; and should he vote against them he would violate his official oath and encounter a still more fearful danger. It surely cannot require any argument prove that it is incompetent for any court thus to restrict the action of the members of any legislative body.

I have said that the injunction in question had not been sanctioned by any judicial action * * *

The General Term, however, held that the Common Council had no authority under the City Charter, under any statute to give or make an improvident grant of the public property, nor was any such power essential to the performance of any of its legitimate duties and therefore decided that the injunction should be granted. This case went to the Court of Appeals (see *Milhau v. Sharp*, 27 N. Y. 611) and it was held the corporate authorities of

the City of New York have no power to confer upon individuals by contract for an indefinite period the franchise of constructing and operating a railroad in the public streets for their private advantage. And that the powers of the corporation in respect to the control and regulation of the streets are held in trust for public benefit and cannot be abrogated or delegated to private parties and that a resolution of the common council authorizing private persons to construct and operate a railroad upon certain conditions without limitation as to time ^{or} reserving no power of revocation is not a license nor an act of municipal legislation, but a contract which if valid could not be abrogated. On this point the Court said:

“ * * The whole scheme is valid, or no part of it. These privileges, whether they create a monopoly or not, constitute a franchise. * * **

“But neither the corporation nor the common council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution, relating to a subject not within the powers of the body passing it, is merely void.”

WHAT WAS HELD BY THE FOREGOING CASES IS THAT IN 1852 THE LEGISLATURE HAD NOT CONFERRED ON THE LEGISLATIVE BODY OF THE CITY, ITS COMMON COUNCIL, POWER TO GRANT FRANCHISES FOR RAILROAD PURPOSES NOR TO GRANT OR DEED AWAY THE CITY'S PROPERTY IN THE STREETS FOR THAT PURPOSE.

Therefore it appears that these cases are no way in point on the question as to whether the Board of Estimate and Apportionment of the City acting under powers expressly bestowed upon them by the Greater New York

Charter are acting legislatively or not. Under the Greater New York Charter today, *legislative power to grant franchises* has been expressly given to the Board of Estimate and Apportionment of the City. (Page 58 hereof).

These authorities are to the effect that the *courts* of this state should not restrain the legislative acts of a common council of a ~~city~~^{city} or other proper legislative body.

Under the written constitution of the State of New York, the powers of government are divided into executive, legislative and judicial. (McKinney's Consolidated Laws of New York, Ann. Vol. 1, p. 10).

This division of power and the wisdom of it has been well described by Judge Vann in *People ex rel. Burby v. Howland*, 155 N. Y. 270, at page 282 and 283:

"The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. Weaken any one of them by making it unduly dependent upon another and a tendency toward the same evil follows. It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others.

"Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power. Not a contract is made except in reliance upon their ability to afford redress if it is violated. Men part with property upon the promise of their fellows, walk the streets by day and sleep in peace at night in the confidence that the silent and unseen power of the judiciary is always ready to protect their rights. *Any legislation that hampers judicial action or interferes with the discharge of judicial functions is in conflict with the principles of the Constitution.*"

This separation of the constitutional powers and the reasons for such is made clear by the decision of Judge Haight in *People ex rel. Broderick v. Morton*, 156 N. Y. 136, at pages 144 and 145:

"Under our Constitution the executive power of the state answers to that of the king, and devolves upon the governor during the term for which he is elected. The legislative power is vested in the senate and assembly, which take the place of Parliament, and the judicial power in the courts established in accordance with the provisions of the Constitution. The three great branches of government are separate and distinct, but are co-equal and co-ordinate; their powers have been carefully apportioned; one makes the laws, another construes and adjudges as to the rights of persons to life, liberty and property thereunder, and the third executes the laws enacted and the judgments decreed. While each department, in its sphere, is in a sense independent, each operates as a check or restraint upon the other. The acts of the legislature have to be presented to the executive for his approval. *The courts may then construe the acts and determine their validity under the Constitution;* and the executive may, in criminal cases, modify the action of the courts by

the interposition of his pardoning power. But in every case in which one department controls, modifies or influences the action of another, *it acts strictly within its own sphere, thus giving no occasion for conflict and thus preserving the purpose of the original scheme of a division of power among the three co-ordinate branches of government, each operating as a restraint upon the other, but still in harmony.* * * *

It therefore follows that the proposed resolution was legislative and that the Court had no right to interfere with its passage.

(d) The City had the right to enforce the contract of October 29, 1912, by a resolution forfeiting it for non-performance. This was not a matter in which the Attorney General was interested.

(1) This proposition is sustained by the Court of Appeals and by the Supreme Court of the United States.

Holmes Electric Protective Co. v. Williams,
228 N. Y., 407, 434;

Matter of New York Electric Lines, 201
N. Y., 321;

*New York Electric Lines v. Empire City
Subway*, 235 U. S., 179;

New York Electric Lines v. Gaynor, 167
A. D., 314, aff'd in 218 N. Y., 417;

People v. Consolidated Gas Co., 130 A. D.,
626;

Matter of the Attorney General, 124 A. D.,
401, 938;

In *Holmes Electric Protective Company* against *Wil-
liams*, 228 N. Y., 407, the plaintiff raised the question
that the Attorney General and not the City had the right

to question the validity of its franchise. This contention was rejected by the Court and this subject was discussed by Pound, Judge, at p. 434, as follows:

"The City cannot be denied the right to question the authority of the plaintiff to occupy its streets merely because the state does not challenge the existence of such authority. That is settled by Matter of Niagara Falls & Whirlpool Ry. Co. (108 N. Y., 375, 384)."

In *People* against the *Consolidated Gas Company*, 130 A. D., 629, 630 and 631, which involved the right of the municipality to question the franchises of the Consolidated Gas Company, the Court said:

"It may therefore well be left to the local authorities of The City of New York to determine what course should be pursued in the premises.
* * *

(2) The cases cited by Appellants on this Point are not relevant, as they involve primarily the forfeiture of State Charters.

The case entitled *N. Y. Central and Hudson River R. R. Company v. City of New York*, 142 App. Div., 578, affirmed in 202 N. Y., 212, does not lay down a doctrine in conflict with the above proposition. The Hudson River Railroad Company was incorporated by Chapter 216 of the Laws of 1846. At this time the *State only* could grant a franchise to operate a surface railroad in the streets of New York City, and the use of the City's streets was not then under its control through constitutional provision. The City had at that time no power to grant a franchise to use its streets for railroad purposes. The corporate life of the Hudson River Railroad Company was limited to *fifty years*. Later, through Chapter 917 of the Laws of 1869, a new corporation, called the *New York Central and Hudson River Railroad Company*, was formed with a corporate life of 500 years.

The Appellate Division held that when the Hudson River Railroad Company complied with the provisions of the Act of 1846 and the City of New York having consented to the construction of the railroad on certain streets provided for in said Act the corporation thereby acquired a franchise to construct a railroad upon the route adopted, within the City, *which neither the City nor any power except the State of New York could interrupt or interfere with.* Justice Ingraham, who wrote the opinion for the Court in this case said, in part, as follows:

“This action was brought to enjoin the City of New York from enforcing a resolution of the Board of Estimate and Apportionment directing the President of the Borough of Manhattan to remove the plaintiff's tracks from the streets and avenues within the City. If this resolution was an invalid exercise of power by the municipality it conferred no authority upon the Borough President to remove the tracks, and his threatened action would have been an illegal act which the Court was required to enjoin. The plaintiff as before stated was *exercising a franchise granted by the State.* It was conceded that a legal franchise had been granted, but it was claimed by the City that *that franchise had expired by limitation.* The State has not questioned the right of the plaintiff to exercise the franchise which was granted to the Hudson River Railroad Company, and which was *concededly a legal franchise,* and as I understand the settled law of the State, *it is the State only that can question the right of a corporation to exercise a franchise granted by the State.* Thus it was said in the case of *City of New York v. Bryan* (196 N. Y., 158): * * * Here the plaintiff was exercising a franchise granted by the State and in the exercise of that franchise had maintained tracks in certain streets of the City of New York for many years. The use of these streets was essential to the plaintiff in the exercise of its franchise.

The City of New York claimed the right to remove these tracks from the public streets *upon the ground that the franchise granted by the People of the State had expired* and in the enforcement of that claim had threatened to forcibly remove the tracks. *I think it was for the State and the State alone to question the right of the plaintiff to continue to use the franchise that the State had granted and that neither the municipal corporation nor any one else could by force prevent the exercise of that franchise so long as the State made no objection."*

It may be noticed here that the consent of the City to this company *was absolute and perpetual in terms*, and the City was claiming that the company could not continue to operate under it for the reason that its *State Charter* was only for 50 years and the local consent could not extend beyond that period, although the State had extended the life of this corporation. Moreover, the local consent was given in 1846 before the enactment of Art. III, sec. 18, of the State Constitution (p. 175 hereof).

The Appellate Division, however, did not direct that the complaint be dismissed on this ground and affirmed the judgment below, and the judgment was on May 2, 1911, affirmed in the Court of Appeals. Nothing, however, was said in the Court of Appeals concerning the right of the City to attack the franchise of the Railroad.

The case entitled *City v. Bryan et al.* as trustee of the Long Island Railroad, 196 N. Y., 158 (cited on p. 141 of Appellants' brief) was a *submission of a controversy* upon an agreed state of facts. The City sought to have *determined the validity of the franchise of the New York and Long Island Railroad Company* to construct, maintain and operate *the railroad* through a tunnel under 42d Street from the Grand Central depot and under the East River to Long Island City. The Court held that this could not be determined in a controversy between the

City and the bondholders. It did say, however (at p. 168, that:

“If in the discharge of its municipal functions it became necessary for the City to enter into the defendant’s tunnel, below the surface of the street, and the defendant should resist, it is possible that the Court might, in litigations arising therefrom, be compelled to decide the rights of the defendant to the franchises and the structure in the particular streets occupied by it.”

In this case it was admitted that on January 1, 1907, the corporate existence of the New York and Long Island Railroad Company ceased and terminated and at this period of time the railroad had been only partially constructed, but no part had been operated. There was no expressed time limit in the local constitutional consent granted to this company by the New York Aldermen or the Long Island City Aldermen and these consents were on January 1, 1907, existing unless they were so connected with the charter franchise of the New York and Long Island Railroad Company that they terminated on that date when the corporate existence of that company lapsed.

What was involved in the Bryan case was the forfeiture of the State Charter. The City had no right to claim a forfeiture of the local consent of the Aldermen unless by and through an annulment of the State Charter.

There is no question here of the forfeiture of the charter of this corporation.

(3) A court of equity abhors a failure of justice as nature does a vacuum.

In

Lindeke v. Associates Realty Co., 146 Fed., 630, at page 639,

which involved the question of a right of a lessor to forfeit a franchise for the failure of the lessee or tenant for whom a receiver had been appointed to construct a building according to the provisions of the lease, Judge Philips said:

"As the lessees named in the lease contract were individuals it accounts for the absence of the usual prescription where the lessee is a corporation as to how the notice to quit should be served. The service of notice in this case we think was good under the local statute of the State, and was good at common law, made upon so important an officer as the treasurer as a means of conveying notice to the corporation. The service being good at the time when made upon the corporation, the subsequent adjudication of bankruptcy and the selection of trustees did not abrogate the service already made upon the corporation or necessitate re-service on the trustees in bankruptcy. In this respect the trustees succeeded only to the rights and stead of the bankrupt, and took the estate *cum onere*. Under such circumstances, the trustees stand simply in the shoes of the bankrupt at the time they succeeded to the estate. See *York Manufacturing Company v. Cassell, et al.*, 201 U. S., 344, 26 Sup. Ct., 481, 50 L. Ed., 782; *Thompson v. Fairbanks*, 196 U. S., 516, 25 Sup. Ct., 306, 49 L. Ed., 577; *Yeatmann v. Savings Institution*, 95 U. S., 764, 24 L. Ed., 589; *Hewitt v. Berlin Machine Works*, 194 U. S., 296, 24 Sup. Ct., 690, 48 L. Ed., 986.

"The final contention of appellants' counsel is that the courts are *adverse to forfeitures* and that they are the *abhorrence of courts of equity*. Equity, however, *still more abhors a failure of justice, as nature does a vacuum*. In *Brewster v. Lanyon Zinc Company* (CC. A.), 140 Fed., 801, 819, the conditions under which a court of equity will assist in the enforcement of a forfeiture under leased contracts, are extensively discussed by Judge Van Devanter. His conclusion is aptly expressed in the following paragraph:

“The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cognizable in equity, *there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice and morality than to withhold equitable relief.* As said by Story, Eq. Jul., Par. 439: “The beautiful character and pervading excellence, if one so may say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.”

“What would be the attitude of the lessor in this case if the court cannot declare a forfeiture and restore the possession of the premises to it as long as the trustees in bankruptcy may continue to pay the rentals and observe the other requirements of the lease, *short of the erection of the new building?* A suit for specific performance would hardly lie against the trustees in bankruptcy to erect the new building on the premises. *Where would they get the funds applicable to such purpose?* If they have other assets than the leasehold interest, *the court of bankruptcy could not take that fund which it holds for the benefit of all the creditors of the estate and invest it in a permanent building improvement to run with the lease.* Neither would the court of bankruptcy hold up the closure of the administration of the estate through a long period of time for the construction of *such improvement as the lease contemplates*, and await the result of the income therefrom for distribution among the creditors. The bankrupt law does not contemplate such proceeding. The only remedy, therefore, according to appellants' suggestion would be an action for damages on the broken covenant to build. * * *

(4) So long as the Manhattan & Queens Traction Corporation remains a Public Service corporation, it is charged with the duty, under the Railroad Law, from which it obtained its being, to construct and operate its line to its full length.

Public Service Commission for the First District v. Richmond L. & R. Co., 163 N. Y. Sup., 64; ~~108 Misc. 721, aff'd 188 App. Div. 721~~;

Public Service Commission for the First District v. N. Y. Railways Co., Special Term, August, 1912, 77 Misc., p. 487;

People ex rel. New York & Q. C. R. R. Co. v. Public Service Commission, 173 App. Div., 826;

People of the State of New York ex rel. N. Y. & Queens Gas Co. v. McCall, 219 N. Y., 84; 245 U. S. 345;

Paige v. Schenectady R. R. Co., 178 N. Y., 114;

Public Service Commission v. Westchester St. Ry. Co., 206 N. Y., 209;

Columbus Ry. Power & Light Co. v. City of Columbus, 253 Fed., 499.

In *Public Service Commission for the First District v. Richmond L. & R. Co.* (*supra*), the railroad company denied that it had any franchise or right to build or operate a railroad beyond a certain point. Judge Kelly, writing the opinion at Special Term, Richmond County, February 1, 1917, said:

"The old remedy for failure to comply with the

terms of a public franchise to operate a railroad in whole or in part was an action by the Attorney General to forfeit the franchise and, as I said on the trial, a railroad corporation *must comply with the terms of the franchise as an entirety. It must take the fat with the lean.* It cannot avail itself of the desirable part of the route which it is authorized to construct and operate, and abandon what it may conceive to be the undesirable or unprofitable portion."

In *Public Service Commission for the First District, plaintiff, against ^{the} Railway R. L. & R. R. Company, defendant (supra)*, the Court held that where a railroad company was granted a franchise to construct and operate a railway on 116th Street in the City of New York, to run from Morningside Park to the East River, and the road was built and operated only to a point one block west of the river, it is no answer to application for a writ of mandamus to compel the extension of the line to the river that the *extension* would not be *financially profitable*. The Court held that the railroad company owed a duty to the public to exercise its franchise and cannot, at pleasure, abandon a portion of its road and incur a forfeiture as the franchise must be accepted or rejected in toto.

In *People of the State of New York ex rel. New York & Queens Gas Company v. McCall (supra)*, an order of the Public Service Commission directing the gas company to extend its mains and service in such manner as may be necessary to supply a community with gas at Douglaston and Douglas Manor, was upheld. The company's gas plant was located at Flushing, about six miles from Douglaston, and the gas company strenuously opposed this order. The decision of the Court of Appeals was affirmed by the Supreme Court of the United States (see 245 U. S., p. 345).

In *Paige v. Schenectady R. R. Co. (supra)*, the Court said:

"A railroad corporation owes a duty to the public to exercise the franchise granted to it, and it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure. A charter must be accepted or rejected in toto. If accepted, it must be taken as offered, and the company has no right to accept in part and reject in part."

In *Matter of City of New York v. New York & East River Ferry Company* (*supra*), Judge Donnelly said:

"The continued operation of the ferry is necessary for the convenience of the inhabitants of the Borough of Queens and Manhattan, and the possible discontinuance of the ferry is a matter of public concern. The ferry company is not merely under a contractual duty to the city, but it is also under a duty to the public to maintain and operate the ferry during the term of its lease. *The mere fact that the operation of the franchise is unprofitable is not sufficient to relieve the company of its public duty.*"

In *Public Service Commission v. Westchester Street Railway Company* (*supra*), where the municipality had made the observance of a five-cent fare a condition of its consent, and the company later tried nevertheless to charge more, the Court of Appeals said:

"I am not aware of any principle or authority which compelled the court to refuse to enforce the obligations imposed by the contract involved simply because one of the parties had inadvisedly agreed to unprofitable terms."

It follows, from the foregoing decisions, that the Manhattan & Queens Traction Corporation, so long as it continues to be a Public Service Corporation or a railroad corporation, must operate its entire line.

(e) The alleged impossibility of this corporation to construct its line to Farmers Avenue as directed by the Board is not a legal excuse.

(1) The general rule of law is that where a party by his own contract imposes a duty upon himself he is bound to perform it unless performance be made impossible by act of God, by the law or by the other party.

Columbus Ry. & P. Co. v. Columbus, 249 U. S. 399;

Roxford Knitting Co. v. Moore & Tierney, 265 Fed. 177, 179;

P. N. Gray & Co. v. Cavalliotis, 276 Fed. 565, 570.

There is not sufficient evidence in the record to show the corporation was prevented by the War Board to construct and operate and therefore such cases as the following do not apply:

Texas v. Hogarth Shipping Co., 256 U. S. 619;

Mawhinney v. Millbrook Woolen Mills, 231 N. Y. 290.

(2) The contractual obligations of the Manhattan and Queens Traction Corporation were not changed by the appointment of the receivers.

The appointment of the receivers did not cause a dissolution of the Manhattan and Queens Traction Corporation or supersede it in the exercise of its corporate powers, except in so far as operating said franchise is concerned.

Decker v. Gardiner, 124 N. Y., 334.

Moreover, such an appointment did not affect the right of the said Traction Corporation to exercise its corporate powers, which it can exercise without interfering with the rights of the receivers, and said Traction Corporation is under the duty to perform every act required of it by law which can be performed without such interference. Nor did the appointment of the receivers relieve said Traction Corporation from its liability to be sued upon any cause of action accruing prior to the appointment of the receivers.

Decker v. Gardiner, supra;

Finance Co. of Penn. v. Charleston, 46 Fed., 508.

The receivers did not take the franchise either general or special of the said Traction Corporation into their possession as such a franchise is an *incorporeal hereditament*.

Connor v. Tenn. Central Ry. Co., 109 Fed., 931, 939, 940.

All that the receivers have acquired is the management of said franchise.

The receivers must comply with all statutory requirements as to the use and operation of said franchise and must operate said franchise according to the laws of the state in which it is situated.

Peckham v. Duchess R. R. Co., 145 N. Y., 385;

Matter of Jacobson, 23 App. Div., 77;

Erb v. Morasch, 177 U. S., 584;

United States v. Nixon, 235 U. S., 231, 234;

Penn. S. Co. v. N. Y. Rys. Co., 225 Fed., 734, 736;

Lindke v. Associate Realty Cos., 146 Fed., 630.

The receivers took no title to the property. They are not assignees of the franchise contract and hold the property of the said Traction Company equally for the benefit of all persons interested in it.

Prince v. Schlessinger, 116 App. Div., 500;
Durand v. Howard, 216 Fed., 587.

The appointment of the receivers did not modify in any manner the franchise contract entered into by the said Traction Corporation with the City of New York, and they took such franchise subject to all the defeasances or forfeiture conditions.

The enforcement of said franchise contract according to its terms, by a resolution of the Board of Estimate and Apportionment forfeiting it, *could not be construed as affecting the title, possession or control of the receivers over the property of said Traction Corporation and only in such a case would the receivers have the right to restrain the action of the Board of Estimate and Apportionment.*

Swift v. Black Panther Oil & Gas Co., 244 Fed., 20.

The grounds of forfeiture of said franchise accrued previous to the appointment of the receivers and therefore the act of the Board of Estimate and Apportionment in voting on or passing a resolution forfeiting said franchise, would not be an interference with the possession or management of said franchise contract by said receivers for the reason that the said receivers obtained possession only of what the involvent had and took the said franchise contract cum onere.

Odell v. H. Batterman Co., 223 Fed., 292.

Judge Rogers in this case said:

"The receivers are not appointed to keep persons out of their rights. The law does not tolerate so rank an injustice" (p. 296).

See also:

In re Roth and Appell, 181 Fed., 671;
Penn. S. Co. v. N. Y. C. Rys., 198 Fed., 721,
 729.

There cannot be an interference with the possession of the receivers unless there be an "*actual and physical molestation*"

Royal Trust Co. v. Washburn B. & I. R. Co., 139 Fed., 865, 869.

(f) As the company did not complete construction and put in operation the railway by August 23, 1917, its entire franchise automatically ceased.

The words of Sec. 3, paragraph "seventh" are: (fol. 131):

"Upon failure of the company to complete the construction and place in operation any of the said portions of the railway on or before the *dates or times* herein specified, the right herein granted shall *cease and determine*. * * *

(f) The words, "the right herein granted *shall cease and determine*," creates a self-executing forfeiture clause.

Matter of Brooklyn, Q. & S. R. R., 185 N. Y., 171;

People v. Stilwell, 78 misc., 96; aff'd 157 A. D., 839;

Matter of Brooklyn, Winfield and Newton R. R. Co., 72 N. Y., 245; 75 id., 335;

Brooklyn Steam Transit Co. v. City of Brooklyn, 78 N. Y., 424.

The District Court made the mistake of believing that the Board of Estimate and Apportionment was proceeding to take action under Section 3, Paragraph "Seventh" of the contract of October 29, 1912, as amended. (See the Court's opinion, first paragraph, where he comments on the words, "the right herein granted.")

The resolution of the Board of October 19, 1917 (fol. 51), and the notice issued in pursuance of it said that the Board would proceed under Section 5, paragraph "Thirteenth" of said contract. (See fol. 100). Section 3, paragraph "Seventh" contained a self-executing forfeiture clause covering the franchise contract and property of the corporation and the deposit of \$15,000 (fol. 131); while Section 5, paragraph "Thirteenth," required affirmative action on the part of the Board before the franchise and property of the corporation could be forfeited and claimed by the City. Although this franchise ceased automatically the Board had a right to rescind this contract by resolution. This terminated right stands *as a cloud upon title* and in justice to the City it should be removed. (*People v. B. R. R. Co.*, 126 N. Y. 29.)

(g) **The Manhattan and Queens Traction Corporation** having accepted the franchise and continued to use the same, cannot now be heard to claim that the burdens and conditions thereof were illegal and void.

Southern Bell Telephone Company v. Richmond, 98 Fed. 671, 673;

People ex rel. N. Y., W. & B. Ry. Co. v. P. S. C., 194 App. Div. 445, 453; aff. in 230 N. Y. 604;

Farnsworth v. Boro Oil Gas Co., 216 N. Y. 40, 45-47;

- Rochester Telephone Co. v. Rose*, 125 App. Div. 83;
Potter vs. Calumet Electric Street Ry. Co., 158 Fed. 521;
Borough of Mechanicville vs. Canton & S. Ry. Co. et al., 113 Atl. Rep. 136;
Gas Securities Co. vs. Antro and Lost Park Reservoir Co., 259 Fed. Rep., 423, 434, 435;
Peo. vs. Suburban Ry. Co., 53 N. E. Rep., 349;
State ex rel. City of Vincennes vs. Vincennes, Traction Co., 117 N. E., 961;
Bay City Bank and Trust Co. vs. Ricestix Dry Goods Co., 195 S. W. 344, 347;
Mayor etc. Borough of Rutherford vs. Hudson River T. Co., 63 Atl. Rep. 84;
Higgins vs. Hocking Valley Railway Co., 188 App. Div., 684, 697, 698.

In *Farnsworth v. Boro Oil Gas Co.* (*supra*) the State Court of Appeals said:

"The subject matter of the consent was one with which the board was not incompetent to deal, and the consent, when granted, conferred upon the defendant at least the color of right. Without that color of right, we may safely assume that it would never have been permitted without molestation to lay its conductors in the highways. No one knew this better than the defendant itself, or it would not have assented to the terms. The impulse that landed it in peaceable possession was the consent of the town board.

"In such circumstances, the defendant will not be heard to say, while retaining possession of the highway, that the consent under which it entered was valueless and void. * * *

The franchise to occupy the highway comes by grant from the state, but the consent of the locality is necessary to make the franchise operative, and when the right is exercised, it is through and under the consent. The elements of an estoppel are thus present, whatever the source may be from which the franchise itself proceeds. The foundation of the estoppel is the fact of the one obtaining possession and enjoying possession by the permission of the other. And so long as one has this enjoyment he is prevented by this rule of law from turning round and saying that his landlord has no right or title to keep him in possession (Tilyou v. Reynolds, supra, at p. 563)."

In *People ex rel. N. Y., W. & B. Ry. v. P. S. C.*, supra, the State Supreme Court said:

"The relator might have contested that point by mandamus proceeding to compel the board of aldermen to eliminate from its consent the attempt to regulate fares, (*People ex rel. Parkway Co. v. Kennedy*, 97 App. Div. 103; *People ex rel. South Shore T. Co. v. Willcox*, supra. See also *People ex rel. Frontier Electric R. Co. v. North Tonawanda*, 70 Misc. Rep. 91; affd., 143 App. Div. 955). But this the relator did not do. On the contrary it formally accepted all the terms and conditions of the ordinance, and down to the present time has acquiesced therein, and doubtless it should not now be heard, in its own right, to question the validity of the provisions of the ordinance as binding it until it is relieved therefrom. (*Rochester Telephone Co. v. Ross*, 125 App. Div. 75; affd., 195 N. Y., 429; *Pond v. New Rochelle Water Co.*, 183 id. 330; *City of Buffalo v. Frontier Telephone Co.*, 203 id. 589). It does not follow, however, that the Legislature could not itself change the rate of fare so prescribed by the ordinance. * * *"

In *Potter against Calumet Electric Street Ry. Co.*, the head note in part reads:

"Where a street railway company, in order to induce the Mayor of a city to sign a franchise ordinance, executed a contract which was void in its inception by which the railway company agreed to pay the city \$50,000. in instalments for the rights granted under the franchise, and after executing the contract the railway company proceeded to construct and operate its road on one of the streets under a permit issued by the Commissioner of Public Works but pursuant to such franchise and contract, the railway company was thereafter estopped to deny that the contract was valid."

In the *Borough of Mechanicville vs. Canton etc., the Court of Errors and Appeals of New Jersey* said:

"The Company having accepted the Ordinance in its entirety, it must accept the burdens. It cannot accept the benefits and reject the burdens." (p. 138).

In the *People ex rel. Jackson vs. Suburban Ry. Co.*, the Supreme Court of Illinois said:

"It is a general rule that undertakings although they be *ultra-vires* will be enforced against quasi-public corporations, if said corporations retain and enjoy the benefits of concessions granted on condition such undertakings should be performed." (case cited) (p. 353).

In *State ex rel. City of Vincennes vs. Vincennes Traction Co.*, the Supreme Court of Indiana said:

"Thus, whenever a corporation accept a municipal franchise embodying certain obligations toward the public, in consideration of rights conferred, such corporation may be compelled by mandate to perform such franchise duties." (numerous cases cited) (p. 961).

In *Bay City Bank and Trust Co. vs. Ricestix Dry Goods Co.*, the Court of Civil Appeals of Texas said:

"It seems now to be settled by the great weight of authority that where there is a question of contract between a corporation and another party, and the contract has been performed by the other party, and the corporation has received the benefit of the contract, it will not be permitted to plead that on entering into the contract it exceeded its chartered powers." (p. 347).

In *Higgins vs. Hocking Valley Railway Company*, the Appellate Division of the Supreme Court through Merrill, Judge, said:

"Referring to an attempt to retain benefits received from a contract which a party seeks to repudiate as *ultra vires*, Judge Finch said in *Seymour vs. Spring Forest Cemetery Association* (144 N. Y., 33-341):

'That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of the State.' " (p. 697).

IV.

The Court of Appeals correctly pointed out that even though the franchise contract had been automatically forfeited the Board could proceed by resolution to rescind under the provisions of Section 2, Paragraph "Thirteenth" of the contract.

(P. 147.)

In the absence of such a resolution there would always be the question of fact and law whether such a forfeiture had actually taken place. *Passage by the Board of a resolution rescinding this contract would establish record evidence that the corporation had lost this franchise right.* Such action would clear the way for some other company, or some action on the part of the City, to supply and obtain sufficient transportation facilities for this section of The City.

Moreover in moving under the provisions of Paragraph "thirteenth" the Board sought to learn the causes of the company's forfeiture and to discover whether or not this corporation would be in a position to carry out this necessary improvement within a reasonable time.

A forfeited franchise is a cloud upon land which should be removed either by legislative act or court decree. (People v. B. R. R. Co., 126 N. Y. 29.)

V.

The resolution adopted February 16, 1917, was valid and proper as the title of the streets involved was in the City and the streets were regulated and graded.

(1) The meaning of the words "streets involved":—

The streets "involved" are described in the contract of October 29, 1912, and this description is quoted at page 8 hereof. After the contract of October 29, 1912, was executed these names were changed and such changes also appear at page 9 hereof.

All these streets and avenues have been and are now numbered.

Thus it is seen that when this contract was made in 1911 some of the streets "involved" were merely *map* streets *over private property*, Woodland Avenue, subsequently named Smith Street, and Ulster Avenue, were both in 1912 private property. In fact, between a point at Brooklyn Avenue (Belleville Avenue) and Pacific Street (Lambertville Avenue) and a point at Ulster Avenue and Merrick Road, where Central Avenue commences the land had to be acquired by the City in street opening proceedings and *completely new streets* (viz., part of Lambertville Avenue, Spangler Street, Brinkerhoff Avenue, Smith Street and Ulster Avenue) *had to be constructed*. *Central Avenue*, however, was an old highway physically on the ground as early as 1860 and probably 1837 p. (102).

These streets and avenues were the "streets involved" which the Board and the Corporation had in mind as requiring vesting of title and grading.

(The city *later* established *wider lines* and *different grades* for these different streets and thereafter adjusted these lines and altered these grades which estab-

ishments and changes are shown by the final maps referred to at page 10 hereof).

The streets involved are also the streets shown on maps 1 and 2 pages 181 and 182, which were made part of the contract and show the old and not the new streets. The first map showing an additional width of old Central Avenue was not adopted until *October 23, 1913*. (p. 11 hereof).

These words "streets involved" used in Section 3, paragraph "Seventh" of the contract of January 21, 1916, were only those streets to which the City had title, either in fee or to an easement, and this appears from the definition of the words "*streets and avenues*" which is given in paragraph "Twentieth" of the contract of October 29, 1912, to wit:

"Twentieth. The words 'streets or avenues' and 'streets and avenues' whenever used in this contract shall be *deemed to mean* 'streets, avenues, highways, parkways, driveways, concourses, boulevards, bridges, viaducts, tunnels public places or any other property to which the City has title' encountered in route hereinabove described and upon or under which authority is hereby given to the company to construct a railway."

In order to arrive at a proper understanding of what is meant by the words "streets involved," we must consider the *provision of the contract of January 21, 1916*, stating the time in which the last section of this railroad should be constructed and operated, in connection with the similar provision in the original contract of October 29, 1912.

According to the original contract the section of the road from the Long Island station to the City Line was to be built

"within six months after notification by the

President of the Borough of Queens that he is willing to issue a permit for the construction of the tracks on the streets involved''.

The amendatory contract of January 21, 1916, provided that the company was to build and put in operation that portion of its railway between the

"Intersection of Sutphin Road (Guilford Street) and Lambertville Avenue (Pacific Street) and the City Line at Central Avenue within such time or times as may be directed by the resolution of the Board upon the recommendation of the President of the Borough, provided that title and that said streets have been regulated and graded."

Comparing these provisions, it will be seen that it was the intention of the Board that the balance of this railroad should be built whenever the Borough President of Queens and the Board concluded *that the streets were in condition for the construction and operation of the road.*

Both the original contract and the amendatory contract used the words "*streets involved*" and these words have the same meaning in the amendatory contract as they had in the original contract, to wit, *the old streets such as Pacific Street and Central Avenue over which the franchise was granted and the new streets over private property (to wit, Smith Street and Ulster Avenue) which were outlined on the tentative map of January 11, 1912.*

(2) In regard to carrying the railroad across the tracks of the steam railroad by an overhead trestle.

(a) In the first place, it was understood between the City and the traction corporation when the original franchise was granted and also when the amendatory

contract of January 21, 1916, was executed that the *corporation would construct a temporary crossing at this point.*

That the corporation understood, when it executed the contract, that its tracks were to cross the roadbed of this steam surface railroad as an overhead crossing *is plain from the fact that it petitioned the board in 1916 for a modification of the contract to cross at grade the industrial sidings or tracks of Adikes and Company, but did not request permission from the board to cross the railroad tracks on Lambertville Avenue at grade (See contract of January 21, 1916, p. 14 hereof).*

That the traction corporation so understood (see 3 par. "eight" of the contract of January 21, 1916 (p. 71), is also plain from the *practical construction* which it put upon this Section. In its verified petition to the board, dated August 16, 1917 (p. 25) its president said:

"After long negotiations with the Long Island Railroad Company, terms of a contract for the erection of a trestle over its right of way across Lambertville Avenue have been agreed upon with one exception. Undoubtedly, an agreement will be reached this month.

The corporation has on hand the greater part of the material with which to construct this trestle."

That the City so understood the contract is plain from the fact that it graded Lambertville Avenue up to the level of the grade of the roadbed of the right of way of the Railroad Company. This appears from the report of Mr. Blake (p. 75) and from the answer of the City (p. 92). This answer states:

"That Lambertville Avenue, between Freehold and Medford Streets, has been brought to a temporary grade so as to be on a level with the roadbed of the Long Island Railroad Company,

where intersected by said railroad, *in order to permit the Manhattan and Queens Traction Corporation to build its railway across the tracks of the Long Island Railroad Company; * * *.*"

(b) On page 56-c of Appellant's brief it is claimed that the map of the City's consulting engineer (Map No. 12, p. 191) requires the company to construct a trestle across the tracks of the Long Island Railroad at an elevation *49 feet* above grade. This plain error arises from lack of ability on the part of the learned counsel for appellant to read map data. The figures referred to are:

49.1

L. I. R. R.

.....

E. I.—29.1.

which means that the present existing physical grade is 29.1 feet above mean high water mark and that the rails of the trestle would be 49.1 feet above such mean high water mark which would make the rails of this Corporation *20 feet* above the rails of the Long Island Railroad.

In fact, according to the determination of the Public Service Commission (p. 113), Lambertville Avenue is to be constructed to pass under the tracks of the Long Island Railroad Company at an elevation of approximately *25 feet above mean high water* and the tracks of the Montauk Division of the Long Island Railroad Company are to be so raised that the elevation of the top of the rail shall be *approximately 42.5 feet above mean high water*. Therefore, according to this order the overhead bridge would only have to be constructed at an elevation of *17-1/2 feet*. (Order of Commission, p. 113).

(3) The Corporation had the right under the Railroad Law to cross the tracks of the steam railroad.

(a) The corporation *had the legal right to cross the tracks of the Long Island Railroad Company*. Section 8, subdivision 5 of Article II of the Railroad Law (p. 176 hereof) gave this right so to do to the Traction Corporation and in such a case compensation would thereafter be determined under Section 22 of the Railroad Law (p. 178 hereof).

(b) Moreover, the Traction Corporation could not cross the roadbed of the Long Island Railroad Company *at grade without the consent of the Public Service Commission* (Railroad Law, Section 98, p. 192 hereof). To the same effect is Section 101 of the Railroad Law (p. 192 hereof) which provides that *no surface railway shall be allowed to lay its tracks at grade across the tracks or roadbed of any railroad operated by locomotive steam power at any point where there are three or more tracks on the route proposed to be crossed*. The Long Island Railroad Company crossed Lambertville Avenue with more than three tracks and therefore this section would apply. (As to number of tracks at this point see map 4, p. 183).

These sections apply to street surface railways and both should be read together.

Jennings v. Delaware, L. & W. R. R. Co., 103

A. D. (N. Y.) 164 Aff. 190 N. Y., 544 memo.

Oneonta etc. R. Co. Cooperstown etc. R. Co.,

85 App. Div. (N. Y.) 284,

Matter of Stillwater v. Mechanicsville St. Ry.

Co., 171 N. Y., 589.

(c) Furthermore, the Long Island Railroad Company *was ready to permit* the Traction Corporation to

cross its tracks by an overhead trestle which appears from the letter of J. F. Keany, General Solicitor for the Railroad Company, dated January 29, 1918 (p. 97), and the proposed agreement by which such consent was to be granted, printed at pages 98 to 100 of the transcript of this record.

(4) Regarding the Order of the Public Service Commission of November 19, 1912.

(p. 112).

(a) In the State of New York, before a new street may be carried across the tracks of a steam surface railroad, the municipality must, after a public hearing, of which the railroad company shall have notice, and at which it shall have the right to be heard, *determine on the necessity of such crossing*. (Railroad Law, Sec. 90, p. 180 hereof).

This determination is reviewable by the Courts. (Matter of Delevan Avenue, 167 N. Y. 256). The City of New York, through its Board of Estimate and Apportionment, held such a hearing and determined that there was a necessity for carrying Lambertville Avenue across the tracks of the southern division of the Long Island Railroad. The Board thereafter made application to the Public Service Commission to have that body determine the *manner of crossing*. The Public Service Commission made an order on November 19, 1912 determining that the street should be constructed to pass under the tracks of this steam railroad at a certain elevation and that the tracks of this carrier should be raised to a certain elevation. This order was amended by the Public Service Commission on December 27, 1912, *approving of a plan for a proposed subway foot-path carrying Lambertville Avenue under the tracks of the*

carrier for the accommodation of the people until the Railway Co. should construct the street across.

In the Matter of the Application of The City of New York relative to opening Lambertville Avenue from Sutphin Road to Merrick Road, in the 4th Ward, Borough of Queens, City of New York, across the tracks of the Montauk Division of the Long Island Railroad Company. 3 P. S. C. R. (First Dist. N. Y.,) p. 766.

This order was therefore made long after July 15, 1912, when the franchise was granted to the corporation by resolution of the Board. So far as carrying Lambertville Avenue across the tracks of the Long Island Railroad Company is concerned, the City has done its part and it now remains with the steam railroad company to construct the street (Railroad Law, subdiv. 6, Sec. 94, p. 187 hereof).

(b) The order of the Public Service Commission made November 19, 1912 and amended December 27, 1912, providing for the manner of carrying Lambertville Avenue across the tracks of the Long Island Railroad Company is in no sense final. This order may be changed at any time by the Commission and a different manner of crossing determined upon.

Peo. ex rel. Town of West Seneca v. Public Service Commission, 130 App. Div. 335.

In fact, the street treatment proposed at this point cannot be carried out without numerous eliminations of existing streets at grade on both sides of Lambertville Avenue which have not yet been provided for by the City or the Commission.

(c) *The construction of Lambertville Avenue across*

the tracks of the railroad company *will have to be done by the Long Island Railroad Company and not by the City of New York*, under the provisions of the Railroad Law (p. 187 hereof). Subdivision 6, section 94 of this statute is to the effect that in carrying out the provisions of Section 90 of the Railroad Law (p. 180 hereof), the work of carrying the streets across should be done by the steam railroad corporation affected, subject to the approval of the Public Service Commission. (p. 187 hereof).

Furthermore, the Public Service Commission and not the City has the power of compelling by mandamus the railroad company to construct new streets across the tracks of the steam railroad. In such a case the construction of a street across the roadbed of a railroad is all that is required and there is no necessity of the City taking title to the right of way of the railroad company in order to carry the street across.

In the Matter of the Application to carry 84th Street, Borough of Queens, etc. The Long Island Railroad Co. appellant, The Public Service Commission and the City of New York, respondents, 189 App. Div. (N. Y. 315.)

In this proceeding before the Commission the Long Island Railroad claimed that the City would first have to condemn an easement over its right of way before it was obliged to construct the street across its tracks which contention was ~~signed~~ ^{DENIED} by the Courts.

It has been the practice of the City of New York to take land for street purposes only up to the right of way of the railroad company. The street must then be constructed by the steam railroad company across its own tracks under authority and direction of the order of the Commission.

GRADING.

All of the "streets involved" had been regulated and graded on February 16, 1917, when the Board adopted the resolution (pp. 21-22) directing construction and operation of the section of the railway between Sutphin and Springfield Roads on or before August 23, 1917.

(1) PRELIMINARY REMARKS ON THE CITY'S CONTRACTUAL DUTY TO GRADE.

(a) The words of Section 3, paragraph Seventh, (p. 17 hereof) are, provided the streets involved "*have been*" regulated and graded—not *will be* graded. The words are "*have been*" regulated ~~and~~ graded.

Moreover, the words are not "re-graded" or "graded over again" or "graded to full width", or "to legal grade" but simply "*graded*".

(b) The words "*regulating and grading*" are always used together. They are not, however, identical. *Grading* is cutting out the hills and filling up the *hollows* while *regulating* is giving the finishing touches such as smoothing the street out and crowning it. Contracts for regulating and grading are always let together.

Section 433 of the Greater New York Charter provides that the Local Board, after a petition is presented as provided in Section 432, shall pass a resolution—

"to bridge, to tunnel, to open, to close, to extend, to widen, to regulate, to grade, to curb, to gutter, to flag and to pave streets, to lay cross walks and to construct sewers in the district".

And Section 435 provides:

"A Local Board shall have the power to cause the *grading or regrading*, the flagging or reflagging, the curbing or recurbing of *sidewalks*, laying or relaying *sidewalks*, constructing of gutters, receiving basins and inlets, fencing vacant lots,

digging down lots or filling in sunken lots within its district," * * *

It will be noticed that *regulating* and *grading* of *streets* do not comprise the other improvements in Section 433 and that *regulation* is not referred to in connection with *sidewalks*. Each of these improvements are separately stated and indicate distinct improvements.

(c) The meaning of the verb "to grade" as defined by our dictionaries is as follows:

The Century Dictionary & Encyclopedia, Vol. IV.:

"Grade, v.—2. To reduce, as the line of a canal, road, or railway to such levels or degrees or inclination as may make it suitable for being used. * * *."

Standard Dictionary of the English Language:

"Grade * 2*. To bring to a level or to a regular inclination; as to grade a road or railroad."

The most apt definition of the verb "to grade" is that given in the opinion of Circuit Judge Rogers in the Court of Appeals at page 148 of Rec. as follows:

"To grade a street or highway, strictly speaking, is to establish a level by mathematical points and lines and then to bring the surface of the street or highway to that level by the elevation or depression of the natural surface to the line as fixed." (p. 148).

What the City undertook to give the Corporation was streets *graded* so that the Corporation could build its railway on them; *that is, streets and avenues that had been made sufficiently level for that purpose*. There is no promise in the contract that the City would "*re-regulate*" or *re-grade* these streets and avenues or bring them to the latest *map grades* but simply that they

must "*have been*" "regulated and graded" at one time or another so that they would be level and usable streets. The words of the contract of January 21, 1916 are that these streets must "*have been*" (at that time) put in condition for construction of the railway and those streets which had not theretofore been regulated must thereafter be put in such condition before the direction to build and operate could have been properly given by the Board.

(d) The Corporation claims that the construction would work injustice to it as it would be obliged at some future date to relocate its tracks.

But this very burden the Corporation expressly promised, covenanted and agreed on its part and behalf to conform to, abide by and perform. (Sec. 6, p. 57.)

This obligation was expressly assumed in Section 3, paragraphs "tenth" and "fourteenth" of the Contract which read:

"Tenth—Should the *grades or lines* of the streets and avenues in which the railway is hereby authorized *be changed* at any time during the term of this contract, *or should any such street or avenue be made a boulevard, in which it may be desirable to have the position of the tracks changed, the Company shall, at its own expense, change its tracks to conform with such new grades, lines and positions as shall be directed by the Board* or by the official having jurisdiction of such streets, avenues or boulevards, and during the construction of any public improvement upon said street, avenue or boulevard, the Company shall *take care of and protect the track at its own expense; all to be done subject to the direction of the City official having jurisdiction. * * **" (p. 45.)

"Fourteenth—It is agreed that the right hereby granted to operate a street surface railway shall not be in preference or in *hindrance*

to public work of the City, and should the said railway in any way interfere with the construction of public works in the streets and avenues, whether the same is done by the City directly or by a contractor for the City, the Company shall, at its own expense, protect or move the tracks and appurtenances in the manner directed by the City officials having jurisdiction over such public work." (p. 47.)

And the amendatory contract of January 21, 1916, was subject to this condition:

"All the terms, provisions and conditions contained in said contract dated October 29, 1912 as amended by said contract dated July 21, 1913, excepting those which are herein expressly amended or modified, shall remain unchanged and in full force and effect."

How then can it be said that the liability of the Corporation to change its tracks in the future would be an injustice to it.

(e) There is no such thing as a final grade. This term is used in Section 951 of the City Charter (p. 208 hereof) in order to define the rights of property owners and allow them damages for grade changes. Such damages do not exist at common law and are allowed only so far as this section provides.

A grade established today may be changed within 2 weeks by the Board of Estimate and Apportionment of the City. (Greater New York Charter, sec. 442 (p. 206 hereof).

2. As to the grading of Lambertville Avenue, Spangler Street, Brinkerhoff Avenue, Smith Street, Ulster Avenue, over which streets and avenues a double track railway was to be built.

The answer of the City appellee alleges that:

"The regulating and grading of Lambertville Avenue, Spangler Street, Brinkerhoff Avenue, Smith Street and Ulster Avenue was finished *December 19, 1916* to their full width as shown by the affidavit of Joseph L. Ashmead, verified January 29, 1918 hereto attached, made part hereof and marked Exhibit B." (p. 92.)

These allegations are admitted by the receivers in their reply, (paragraph VI, p. 108). The affidavit of Joseph L. Ashmead, referred to in the City's answer, is printed at page 96 of the transcript of record.

It appears to be admitted by appellants that these streets and avenues had been graded on February 16, 1917 except that the Corporation claims that the City did not grade "that portion of Lambertville Avenue between Freehold and Medford Streets at other than a *temporary grade*," the contention of the company being that the City was obliged to grade in accordance with the grades shown on the City map.

We admit that between these streets which take in the block each side of the roadbed of the Long Island Railroad, Lambertville Avenue was graded to the level of the roadbed of the Long Island Railroad. In fact, Lambertville Avenue at this point "*has been*" graded and in a manner most convenient for the construction of this railroad. Temporary grading was done at this point so as to facilitate the construction of this railway of the Corporation. The report of J. J. Blake, Engineer of Highways shows this. He reports:

"That Lambertville Ave. between Freehold St. (Norris Ave.) and Medford (Prospect) St. shall be graded to a temporary grade extending from the legal grade at Freehold St. (Norris Ave.) to the existing elevation of the Long Island Railroad tracks and thence to the legal grade at

Medford (Prospect) St. and the contract has been completed in accordance with the resolution of the Board of Estimate and Apportionment." (p. 74).

The Corporation is trying to escape from its contract with the City through the contention that this temporary grade which extends for two blocks is not a "legal" grade. *The word "legal" grade, however, is not used in the contract (p. 17 hereof).* The City's answer to this claim reads (p. 92):

"That Lambertville Avenue, between Freehold and Medford Streets, has been brought to a temporary grade so as to be on a level with the roadbed of the Long Island Railroad Company, where intersected by said railroad, *in order to permit the Manhattan and Queens Traction Corporation to build its railway across the tracks of the Long Island Railroad Company; * * *.*"

3. Old Central Avenue between Merrick Road and Springfield Road has been graded.

Mr. Blake in his report, which is a document on which the receivers base certain facts set forth in their petition (paragraph XIV, pp. 11-12) states:

"No work has been done (*that is, by him as city engineer*) on Central Avenue between Merrick Road and Springfield Road, *excepting the laying of an asphaltic concrete pavement, sixteen feet in width, which is approximately to the grade shown on the final map.*" (Parenthesis ours) (p. 75.)

The reason for laying this pavement without regrading the street was that the physical grade existing and the map grade were identical.

That old Central Avenue had been graded is shown

by the affidavit of Frank B. Tucker (pp. 102-103) which shows that it was *graded, regulated and macadamized* in 1891, again in 1893 and again in 1896 by the Board of Supervisors of Queens County.

That the map grade and the user or physical grade on the ground of old Central Avenue were identical also appears from the affidavit of said Tucker (p. 102) as follows:

"That the grades *established by this map superseded grades previously established*, conforming approximately to the present user grades of the roadway of old Central Avenue (except between Rutland Street and Glenham Street, where they conform with the sidewalk improvements, the maximum variation from the user roadway grades being about $1\frac{1}{2}$ feet) and were established to facilitate the construction of the Manhattan and Queens Traction Corporation's railroad".

Looking at the map (p. 185; map 6) it will be seen that the City on August 14, 1915, abolished certain old map grades (which are marked in black with a line drawn through them showing their cancellation) and established new grades (which are marked in red) in conformity with the existing user grades, and this was done in preparation for and to facilitate the construction of this corporation's railway.

Not only has old Central Avenue been graded and asphalted between Merrick Road and Springfield Road, *but also between Springfield Road and the City Line* and for miles outside of the City Line and to its full length until it reaches again Merrick Road.

Is it reasonable for this corporation to refuse to accommodate the public with this much needed service and transportation on the specious plea that the City did not *reregulate and regrade* in some manner this old Central Avenue?

It is plain, therefore, that the "*streets involved have been regulated^{AND} graded*" in conformity with the terms of the amendatory contract of January 21, 1916.

TITLE TO STREETS.

Title to the streets involved was vested in the City on February 16, 1917, when the Board adopted the resolution (pp. 21-22) directing construction and operation of the section of the railway between Sutphin Avenue and Springfield Road on or before August 23, 1917.

(a) The City of New York owns some of its streets *in fee* and only a *highway easement* over others. And it holds the title to all streets as trustee for the benefit of the people of the whole State of New York.

The only title the public had to the streets in the old town of Jamaica and County of Queens, was a *highway easement*, and this title was acquired by the City of New York on January 1, 1898, when it took over those municipalities. Among the streets thus taken over was old Central Avenue which was an existing highway physically on the ground, 50 feet wide, and had been constructed between the years 1837 and 1866.

(p. 102.)

(b) The Board of Estimate and Apportionment under the provisions of Section 976 of the Greater New York Charter (page 212 hereof) by resolution adopted February 16, 1917, vested title *in fee* to old Central Avenue, between Merrick Road and Springfield Road, in the City (affidavit of Tucker, p. 102). (See draft damage map, Ulster, Westchester, 117th and Dearborn Avenues in four sections; maps, 9, 10, 11 and 12, pp. 188, 189, 190 and 191).

So on February 16, 1917, the City had not only title to a *highway easement*, but title *in fee* to old Central Avenue, fifty feet wide.

(c) The appellant claims that map No. 6, dated August 14, 1915 (p. 185) shows Westchester and 117th Avenues on the map as eighty feet wide streets. The answer is that these avenues as eighty feet avenues were not mentioned in the contract of October 29, 1912. (See description of streets, p. 8 hereof). The only street mentioned beyond Merrick Road in the contract is *old Central Avenue* (page 8 hereof) which was the highway 49½ or 50 feet wide. This was the only avenue "involved" in the description of the route, and is an ample width to allow appellant to build its road of *single track*, which is all that its franchise allows on old Central Avenue. Neither Westchester Avenue nor 117th Avenue were mentioned in the contract—old Central Avenue was the only avenue existing on *July 15, 1912*, when the resolution of the Board was adopted granting the franchise and also on October 29, 1912 when the contract was executed.

This contention is supported by the definition of the word "streets" expressed in the contract (p. 109 hereof).

The City has taken title in fee to the land within the lines of old Central Avenue as it was physically on the ground when the franchise was granted and the contract executed and delivered by the Mayor.

(d) *Title to an easement* in old Central Avenue, between Springfield Road and the City Line is also in the City of New York (affidavit of Tucker, p. 102). This fact is of no relevancy here, but I mention it so as to controvert the appellant's claim to the contrary.

(e) *The City also has title to a highway easement in Central Avenue, where the Montauk division of the*

Long Island Railroad *crosses it*. (See deed, January 13, 1860. p. 104). This deed antedated the railroad which was not constructed until 1873 (Tucker's affidavit, p. 102). See also deed, p. 104). At the point where the Montauk division of the Long Island Railroad crosses old Central Avenue the highway is open across the roadbed of the railroad and the railroad company maintains gates and a watchman at this point at all times.

As to the trestle which the corporation must build to carry its street railway over the tracks of the Long Island Railroad at this point, I will refer this honorable Court to the comments we have made at page 115 hereof in reference to the railroad crossing over Lambertville Avenue. These comments apply equally to this second crossing. (See page 115 hereof).

(f) Title in fee to Lambertville Avenue was vested in the City by resolution of the Board of December 10, 1915 (p. 26) except as to eight damage parcels which are shown on maps 4 and 5, pages 183 and 184.

Map 5 (p. 184) shows these small parcels in red—they do not extend half way across the sidewalks of Lambertville Avenue and in no way interfere with the 40 foot roadway over which the corporation has the right to build its double track railway, and these parcels are not within the lines of old Pacific Street mentioned in the franchise of the company, which was a street 60 feet wide.

(g) As to the title of the City to Lambertville Avenue, Spangler Street, Brinckerhoff Avenue, Smith Street, Ulster Avenue.

The answer of the City alleges:

“ * * *, that title was taken to Lambertville Avenue and also to Spangler Street, Brinckerhoff

Avenue, Smith Street, Ulster Avenue to Merrick Road—"in order that the way might be cleared for the issue of a permit to the Manhattan and Queens Traction Corporation for the construction of a trolley railroad." And the said streets and avenues were regulated and graded: "in order to clear the way for the construction of a trolley railroad under a franchise granted to the Manhattan and Queens Traction Corporation." and that the estimated cost of this regulation and grading would be about \$30,000. the burden of which payment will fall upon the property owners along the route."

These allegations are admitted by the reply of the receivers as they make no attempt to deny them and set up no new matter in avoidance of these allegations. (Reply of receivers, paragraph 6, p. 108).

(h) As to the City's *title* in the right of way of the Long Island Railroad where it crosses Lambertville Avenue, I respectfully refer this honorable Court to page 116 hereof, where it is shown that it is not the practice of the City to take title to the right of way of a steam railroad. On the contrary, the custom is to acquire the title to land necessary for street purposes up to such right of way and to depend on the provisions of Sections 90 and 94 of the Railroad Law (pp. 180-188 hereof) to have the street constructed across by the railroad under the direction of the Public Service Commission, for which work the City pays fifty per centum of the cost. If the street be carried under the steam railroad, the bridge becomes part of the railroad. At one time the City did undertake to condemn a right of way for street purposes across a steam railroad and the Court held that the determination of the Commission must first be obtained in all events.

The corporation's contention that surface structures on Central Avenue prevented it from constructing its single line of railway on that avenue is without merit.

(a) The first answer to this contention of the corporation is *that it made no attempt to build this line*. Not even did it seek or request an *administrative permit* of any kind from any city authority, to disturb the surface of Central Avenue for the purpose of constructing this railway.

(b) Telegraph, telephone, electric light poles and hydrants were erected and trees planted in Central Avenue, at an early date and in reference to the *street and sidewalk lines of Central Avenue*.

The Corporation having claimed in its petition that it was impossible for it to construct its line of single tracks on Central Avenue owing to its physical condition the consulting engineer of the Borough President, Clifford B. Moore, made 3 maps showing exactly the locations he was ready, willing and able to give it from Sutphin Road to Springfield Boulevard. These are maps 12, 13 and 14 at pages 191, 192 and 193 of the record.

The Corporation's Engineer Wm. W. Lowe, examined these locations and as to Central Avenue stated there were many telegraph and telephone poles, overhanging branches of trees, hydrants, posts of a gate at the railroad crossing and the run-way of a fire house in the way of construction on such location.

Mr. Moore examined these alleged obstructions and made a report showing that the Corporation's objections were unjustified. This report appears in part in verified form at page 119 of the Record as follows: (p. 119).

“(1) The railroad gate-posts referred to (North side of Central Avenue) and 5.8' and 6.2' from edge of asphalt paving.

(2) There are between 15 and 20 good-sized trees as stated, the overhanging branches of which would have to be removed or trimmed.

(3) There are, as stated, four trees between L. I. R. R. and Caxton Avenue from $7\frac{1}{2}'$ to $8\frac{1}{2}'$ from edge of asphalt.

(4) There is about 75' of concrete curb (*inferior and partly disintegrated*) on the north side of avenue between the Montauk Division and Farmers Avenue, and about 8' from asphalt.

(5) There is a concrete runway 20' to 25' wide into the Hook and Ladder Company, just west of Farmers Avenue.

(6) At corner of Farmers Avenue there are two poles as noted, and also a frame police booth (about 5' x 3).

(7) On the north side of Central Avenue, between Farmers Avenue and Springfield Road, there are at least 25 poles which *would possibly have to be moved*, as well as 15 fire hydrants, with water-gates, which are about in line with the poles. These poles are not New York Telephone Company poles, as stated in accompanying affidavit, but are marked P. T. Co. (possibly Postal Telegraph Co.).

The statement in the said affidavit that 'all poles on the north side of Central Avenue, between said points (Farmers Avenue and Springfield Road) are not represented on the map submitted by the City's is true in so far as the fact that each individual pole is not located. *The locations were made only at each end of a straight line of poles, so that the poles lying between were considered as being on a straight line between the end ones located.*

• • • • •

The railroad gate-posts will not be in the way, as the trolley is obliged, according to the provisions of its contract, to go over the railroad on a viaduct, • • • • •

In regard to the hydrants, they may be removed and a permit for that purpose be issued on application made to the Department of Water

Supply, Gas and Electricity for a change of location.

As to the trees, application should be made to the Park Department, who undoubtedly will have them trimmed so that they will not interfere with the wires or structures of the trolleys. (See Chapter 453 of Laws of 1902.)"

Mr. Moore, in another affidavit verified March 27, 1918 (p. 117) referring to the poles in Central Avenue, said:

"Between Merrick Road and Farmers Avenue the track can be laid upon the north side of the pavement so that no poles will interfere or will have to be moved except in a single instance.

(Between Farmers Avenue and Springfield Boulevard several poles interfere and may have to be moved, but in my opinion no poles need be moved to allow a construction of this railway."

Furthermore, as to the probability of the duration of the temporary location of the single track on Central Avenue, he stated:

"Upon Westchester Avenue, 117th Avenue . . . between Merrick Road and Springfield Boulevard the location is temporary, but no change should be rendered necessary within a space of seven years, at least five, and probably more than ten."

(c) Under the terms of the contract of October 29, 1912 all surface structures which may prevent construction must be removed by and at the expense of the corporation.

The objections of the Corporation that it could not construct because it would have to go to the expense of removing a few poles from the street seems to be without merit *when we consider that it expressly obligated*

itself to remove all obstructions from the street at its own expense which interfered with the construction of its railway. This obligation appellant assumed in the contract of October 29, 1912, Section 3, paragraph "IX" reading:

"Ninth. Any alteration to the sewerage or drainage system, or to any other subsurface or to any surface structures in the streets, required on account of the construction or operation of the railway, shall be made at the sole cost of the Company, and in such manner as the proper City officials may prescribe." (p. 45).

That the Corporation practically construed the contract (sec. 3 par. "ninth") as imposing on it the duty to remove *surface structures* is plain from the letter of the New York Telephone Company (pp. 105 and 106). After negotiations between these two public service corporations as to *surface structures* the Telephone Company agreed to remove its structures provided the Corporation would send its order for the work and material which would amount in all to about \$675. The Telephone Company sent this agreement to the Corporation for execution. The Engineer of the Corporation on September 17, 1917, and again on December 17, 1917 gave its written order to the Telephone Company to temporarily raise its wires from contact with the wires of the Trolley Corporation on Lambertville Avenue "*pending the execution of the above agreement*".

Moreover, under the terms of the contract the company cannot complain with any show of merit that the location of its single track on Central Avenue was to a certain extent temporary for the reason that in the contract of October 29, 1912, paragraphs Tenth and Fourteenth, it accepted the obligation of constructing temporary tracks and assumed the burden of removing them when directed to do so by the City authorities at its own expense.

Paragraph Tenth of the contract reads:

"Tenth. Should the *grades or lines* of the streets and avenues in which the railway is hereby authorized *be changed* at any time during the term of this contract, or *should any such street or avenue be made a boulevard*, in which it may be desirable to have the position of the tracks changed, the Company, shall, at its own expense, change its tracks to conform with such new grades, lines and positions as shall be directed by the Board or by the official having jurisdiction of such streets, avenues or boulevards, and during the construction of any public improvement upon said street, avenue or boulevard, the Company shall take care of and protect the track at its own expense; all to be done subject to the direction of the City official having jurisdiction.

Should, in the opinion of the President of the Borough of Queens, the present roadway of any of the said streets, avenues or highways be of insufficient width to accommodate both railway and other vehicular traffic, the Company shall widen such roadway under the direction of the President of the Borough of Queens to a width sufficient to accommodate such traffic; provided that no roadway shall be widened beyond the total width of the street, avenue or highway."

Paragraph Fourteenth of the contract reads:

"Fourteenth. It is agreed that the right hereby granted to operate a street surface railway shall not be in preference or in hindrance to public work of the City, and *should the said railway in any way interfere with the construction of public works in the streets and avenues*, whether the same is done by the City directly or by a contractor for the City, the Company shall, at its own expense, protect or move the tracks and appurtenances in the manner directed by the City officials having jurisdiction over such public work."

The amendatory contract of January 21, 1916, provides that:

"All the terms, provisions and conditions contained in said contract dated October 29, 1912, as amended by said contract dated July 21, 1913, excepting those which are herein expressly amended or modified shall remain unchanged and in full force and effect."

(d) As to Engineer Ashmead's statement as to the City's custom of removing poles in connection with street grading. (p. 97).

When Mr. Ashmead, City engineer, connected with the Bureau of Highways said in his affidavit (p. 97) that the City always moved all poles inside the curb line when *regulating* and *grading* a street, he was referring to the regulation and grading of the *new streets* or the *additional widths* of the old streets, title to which was in the City.

Moreover Mr. Ashmead was not referring to a special case such as the one in hand where the Public Service Corporation was under a contractual duty to remove all poles and hydrants, if necessary, at its own expense.

He was a Highway engineer in charge of grading and knew nothing about the terms of the contract in question.

If the City will ever undertake to regulate and grade the proposed *additional width* of Central Avenue and remove the poles, etc., to a line inside the *new curb line*, the Corporation will not be obliged to pay for such work. The City, however, had not on January 21, 1916, taken title to the proposed *additional width* of Central Avenue and could ^{not} therefore regulate or grade it.

Mr. Ashmead's statement was made by him to show that the City had removed a few poles in old Pacific street when grading the additional widths of that street.

He was not referring to the special condition that prevailed in Central Avenue *and which avenue was laid out, constructed, regulated and graded as early as 1860.*

In connection with this statement of Mr. Ashmead we must note that the City *did not grade*, but did slightly *re-regulate* Central Avenue before January 21, 1916. This re-regulation was done by laying an asphaltic concrete pavement 16 feet in width along it. This avenue was not *re-graded* for the reason that *it had theretofore been graded* by the Board of Supervisors of Queens County (p. 103).

(e) The companies owning these poles on Central Avenue were willing to permit their removal.

The New York Telephone Company wrote this corporation *on October 1st, 1917* that it was willing to relocate and *reconstruct* its line of telephone on receipt of an order covering actual cost of work plus 10% for supervision of material and 15% for supervision of labor estimating the cost of the work to be approximately \$675. (pp. 105, 106).

This letter shows the corporation was about to make an agreement with the company accepting its terms for the removal of these poles.

The New York and Queens Electric Light and Power Company in a communication dated February 14, 1918, addressed to the Engineer of the City in charge of the Topographical Bureau shows that it had no objection to the removal of its poles provided the Corporation would pay all expenses incurred by them for material and labor. (p. 106).

From the foregoing maps and letters it clearly appears that the Corporation could find no physical obstacle in the way of the construction of its line of *single track* on Central Avenue.

SUMMARY OF FACTS.

On February 16, 1917, the title to the streets involved in the route of the Manhattan and Queens Traction Corporation from Sutphin Road and Lambertville Avenue out to the City Line at Central Avenue was vested in The City of New York and such streets were regulated and graded within contemplation of Section 3, paragraph "Seventh" of the contract of October 29, 1912.

The words, "*streets involved*" (p. 70) used in the amendment of January 21, 1916, of the contract of October 29, 1912, means the streets originally mentioned and involved in the said contract of October 29, 1912, and refer solely to the streets and portions of the streets actually owned by and belonging to The City of New York and not the streets or portions thereof as they are proposed on the final map of The City of New York.

The words found in the amendment of January 21, 1916, to wit: provided that the "title to the streets involved has been vested in the City" (p. 70) did not change in any way the original contract of October 29, 1912, as Section 5, paragraph "Twentieth" of that contract provided that the words "streets or avenues" wherever used in this contract shall be deemed to mean streets and avenues "*to which the City has title.*" (Par. "Twentieth," p. 57).

The placing of a proposed street on a City map does not make it a public street nor a street belonging to The City of New York, and lands lying within the lines of a proposed City street do not actually become a City street until title is vested in the City through street opening proceedings, delivery of a deed or by dedication and acceptance. *Foster v. Scott*, 136 N. Y., 577. In fact the

words "streets involved" used in said amendment or contract of January 21, 1916, refer only to *so much of such streets* as are involved in or necessary to the construction of the railroad of the Manhattan and Queens Traction Corporation, and such portion of such streets would not include the land lying between the curbs thereof and the street lines of such streets. (*Deft's Exhibit "C"* attached to answer.) (Map No. 4.)

Under the general rule of the Board of Estimate and Apportionment of April 23, 1909, all streets 75 feet wide must have a roadway of 40 feet and sidewalks of 17½ feet on each side—that is the roadway under such rule must be 80% of the street, less 20 feet (p. 91).

Lambertville Avenue was laid out on the final map of The City of New York, as amended by map dated February 19, 1915, approved by the Board of Estimate and Apportionment April 1, 1915, as a street 75 feet wide. Title to this avenue was on December 18, 1915, vested in The City of New York by resolution of the Board of Estimate and Apportionment December 10, 1915 (p. 91).

See

Copy of resolution attached to the petitioner's petition, marked Exhibit "A" (p. 23; map 4; p. 183).

The damage parcels mentioned in this resolution and stated to be excepted are shown in the draft damage map dated April 14, 1915, of Lambertville Avenue, extending from Sutphin Road to Merrick Road, filed in the office of the Topographical Bureau of the Borough of Queens. (See copy of this map, marked Exhibit "A" attached to defendant's answer.) (Map 4.)

This map shows the lines of old Pacific Street 60 feet wide, and also the lines of the proposed new street called

Lambertville Avenue 75 feet wide, which takes in said old Pacific Street.

The receivers allege in paragraph XIII of their petition (~~fol. 19~~^{p. 18}) that the source of their information and grounds of their belief as to the facts alleged in said paragraph XIII are the following:

- (1) "Copy of the resolution adopted by the Board of Estimate and Apportionment on December 10, 1915," a copy of which is annexed to the petition made part hereof and marked Exhibit "A" (fol. 20).
- (2) "Resolution adopted by said Board on December 10, 1915," copy of which is annexed to this petition made a part hereof and marked Exhibit "B" (fol. 20).
- (3) "As to the temporary grade of Lambertville Avenue; the aforesaid order of the Public Service Commission, dated November 9, 1912" (fols. 210-212).
- (4) "Damage map dated May 18, 1916, relative to Ulster Avenue, Westchester Avenue, etc., in the Fourth Ward of the Borough of Queens" (Maps 8, 9, 10 and 11).

The damage map referred to under subdivision 4 is undoubtedly the map, a copy of which is attached to the City's answer and marked Exhibit "A" (Map 4; page 183.) (p. 91).

The map marked Exhibit "A" and attached to the City's answer shows Parcels 24, 25, 33, 94, 115, 119 and 107, *checked in red*, which are excepted by the resolution passing title to Lambertville Avenue, to its full width in The City of New York (Map 4). The size and location of these small parcels have been more distinctly and clearly set out in the small map attached to the City's answer and marked Exhibit "C" (Map 5). (Page 184). This map shows that these parcels do not extend

one-half way across the sidewalk area of that street and do not in any case touch the 40-foot roadway, *and therefore would not in the least interfere with the construction of a trolley line on that said roadway on Lambertville Avenue.*

These portions numbered as above shown and excepted by the said resolution of the Board of Estimate and Apportionment are the only "*portions of the streets involved,*" lying between the intersection of Sutphin Road and Lambertville Avenue and all the way out to Merrick Road, title to which has not been vested in The City of New York. We therefore have, after passing from Lambertville Avenue, and including Spangler Street, Brinckerhoff Avenue, Smith Street and Ulster Avenue, *streets and avenues with title vested in The City of New York and regulated and graded to the full width of those streets as shown on the final City map.* Title was taken by the City to Lambertville Avenue, Spangler Street, Brinckerhoff Avenue, Smith Street and Ulster Avenue out to Merrick Road by resolution of the said Board on December 10, 1915.

"In order that the way might be cleared for the issue of a permit to the Manhattan and Queens Traction Corporation for the construction of a trolley railroad" (Ans., p. 91).

The City decided not to include in said resolution of December 10, 1915, the portions excepted from Lambertville Avenue for the reason that in taking them the City would have been obliged to take and pay for more than 10 feet of the front of houses and *would have had in consequence to pay for the buildings damaged to the full extent of the renewal or reproduction cost thereof* (p. 96).

They are not therefore part of the streets involved. However, no matter what the tentative City map may

show or even the final City map may show, the said portion so excepted are not parts of the *streets involved* in said franchise contract of January 21, 1916, amending the contract of October 29, 1912 (p. 96).

The streets and avenues were graded: "In order to clear the way for the construction of a trolley railroad under a franchise granted to the Manhattan and Queens Traction Corporation" (p. 91).

This regulating and grading cost the abutting owners \$30,000, and they willingly paid it in expectation that the Manhattan and Queens Traction Corporation would build its line according to its contract (p. 91).

The regulating and grading of Lambertville Avenue, Spangler Street, Brinckerhoff Avenue, Smith Street and Ulster Avenue were finished December 9, 1916, to their full width. (Afft. of Joseph L. Ashmead, being Exhibit "B" attached to City's answer, p. 96).

With the exception of the parcels shown on Map 5, p. 184, Lambertville Avenue was regulated and graded to its full width and so were Spangler Street, Brinckerhoff Avenue, Smith Street and Ulster Avenue out to Merrick Road. This Honorable Court will please take notice that the words "*legal grade and full width*" used by the receivers in their petition (par. XIII (fol. 19) are not used in the contract of January 21, 1916. We only find the words, "*said streets have been regulated and graded*" (p. 70).

Lambertville Avenue, between Freehold and Medford Streets, has been brought to a *temporary grade so as to be on the level with the roadway of the Long Island Railroad* as it now exists physically on the ground and where intersected by said railroad in order to permit the Manhattan and Queens Traction Corporation to build its railway across the tracks of the Long Island Railroad Company (p. 7).

The contract of January 21, 1916, amending the contract of October 29, 1912, does not provide that "*streets involved*" should be graded *to the grade shown on the final map of The City of New York* (p. 70).

The City contends that the construction of said temporary grade *in the manner most appropriate for the construction of said railroad* was sufficient to justify the Board of Estimate and Apportionment on February 16, 1917, directing the construction of the railroad from Sutphin Road to Springfield Road.

Where the City proposes, as in this case, to carry a new street across the roadbed of a steam surface railroad, it does not take title to the roadbed. It *acquires an easement or condemns the fee* up to the boundary line of the railroad right of way and there stops.

The proceedings before the Public Service Commission *determining the manner of crossing* under Section 90 of the Railroad Law gives the City sufficient title and authority to carry the new street across the steam surface railroad (sec's 90, 94 of the Railroad Law (p. ~~180~~)).

The roadbed of the Long Island Railroad Company is *not part of the street, nor is it any portion of the streets involved in said contract of January 21, 1916*. Not only has the roadbed of the Long Island Railroad Company where it crosses Lambertville Avenue *been excepted* by the resolution of the Board adopted December 10, 1915, but it has also been excepted in the damage map. (Exhibit "A," attached to City's answer.) (Maps 4 and 5, pp. 183, 184) (p. 20).

The Manhattan and Queens Traction Corporation may build its trolley line across the right of way along the Long Island Railroad Company where it crosses

Lambertville Avenue and whenever said Manhattan and Queens Traction Corporation desires so to do. In the first place, the Long Island Railroad Company *has volunteered to contract* with said Traction Corporation to permit it to build across its roadbed. (Letter of J. F. Keany, Gen. Sol. of Long Island Railroad, dated January 29, 1918: Exhibits "D" and "E" attached to City's answer.) (pp. 97-100.)

Moreover the Railroad Law (Section 22) provides, in part, as follows:

"Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor (p. 178 hereof).

This section of the Railroad Law applies to trolley lines. *Buffalo, B. & L. R. R. Co. v. N. Y. L. E. & W. R. Co.*, 72 Hun., 583; *Matter of Stillwater & M. St. Ry. Co.*, 171 N. Y., 589, Rev's'g 72 A. D., 294.

Again I call this Honorable Court's attention to the fact that the words "*proper legal grade or legal grade*" were not employed in the contract of January 21, 1916.

The fact that the right of way of the Long Island Railroad Company is *fenced in* (p. 11) *on each side* where it crosses Lambertville Avenue *clearly shows that the roadbed of that railroad is not and has not at any time been considered as part of Lambertville Avenue*, consequently cannot be considered as a "portion of any of the streets involved."

The contention made by the said Traction Corporation that when Lambertville Avenue should be *legally and physically* opened and graded it will pass under the tracks of the Long Island Railroad Company as set forth

in the order of the Public Service Commission dated November 9, 1912, in case No. 1567, may not be true.

The order of the Public Service Commission mentioned did not give a vested right either to the railroad company or to The City of New York. This order may at any time be modified or vacated in the application of either party. The power of the Commission over such matter is *continuous*.

(*People ex rel Seneca v. P. S. C.*, 130 App. Div. 335 App. dismissed 195 N. Y. 562.)

This order provided in part as follows:

“That before actual work is begun on the proposed improvement and not later than January 1, 1913, a suitable temporary passageway be constructed beneath the tracks of the Long Island Railroad Company for pedestrians.”

It would be impossible to carry out this elimination, which would cost about \$100,000, without also carrying out a grade elimination for some nine or ten other crossings. There is no probability that this grade elimination will be constructed within the next twenty-five years, and perhaps never.

The Borough officials of Queens asked the Public Service Commission for a determination as to the manner of carrying Lambertville Avenue over said steam surface railroad, *in order that they might fix the map grades on their tentative City map.*

Knowledge of how the State Public Service Commission would treat this crossing was required preliminary to the preparation of the remaining portions of the map of Lambertville Avenue and the other streets involved for the construction of this railway of the Manhattan and Queens Traction Corporation.

The contract of January 21, 1916 (p. 70), amended

Section 3, paragraph "Eight" of the contract of October 29, 1912 (p. 45), so as to authorize this company to construct at its own expense a *temporary crossing or approach* either upon private property or within the line of any street or avenue involved, and *permitted said company to continue to use such temporary crossing until such time as either the grade of such street or avenue or railway shall have been changed* so that such railway or railroad shall not cross such street or avenue at the grade thereof (p. 72).

Old Central Avenue, between Merrick Road and Farmer's Avenue, was acquired in fee by the Commissioners of Highway of the Town of Jamaica to the width of three rods or 49½ feet on *January 13, 1860*, and therefore this avenue and its ownership by the Town of Jamaica *antedated the construction of the Montauk Division of the Long Island Railroad Company* (pp. 102, 103). This Montauk Division of the Long Island Railroad Company *was not built until the year 1873*. (See affidavit of Frank B. Tucker, Exhibit "F", attached to City's answer (p. 101). Copy of deed attached to said affidavit of Frank B. Tucker (p. 104). This deed undoubtedly gave a transfer to all interest which the owners had, which was a fee, and such a title the Commissioners of Highways received through said deed or grant. The Commissioners of Highways were capable of accepting a deed in fee of said land for highway purposes. *Vail v. Long Island Railroad Co., et al.*, 106 N. Y., 283.

Old Central Avenue, including *Westchester*, 117th and *Dearborn* Avenues were laid out to the width of about 49½ feet. Exhibit "F," attached to City's answer. Affidavit of Frank B. Tucker, Exhibit "F," attached to City's answer (p. 102).

The map (Map 6, p. 185) shows the line of said old Central Avenue as well as the line of the proposed new

street to be acquired. This 49½ feet of old Central Avenue is what the receivers call in their petition "the travelled roadway of old Central Avenue."

Whether or not title to old Central Avenue, now Dearborn Avenue, located between *Springfield Road* and the *City line*, is now or has been vested in The City, is irrelevant on the question here presented for the reason that the Traction Corporation was directed to extend its line *only out to Springfield Road* and no further (p. 10).

Previous to February 6, 1917, old Central Avenue was, and now is regulated and graded to the *full width* of said avenue, which is about 50 feet. (Affidavit of Frank B. Tucker, Exhibit "F," attached to City's answer.) (p. 101).

The grades of old Central Avenue established by map 6 (p. 185) superseded grades previously established by the final City map. These amended grades, so fixed by map 6 (which is a *special final map*, showing grade changes only ~~conform~~), conform to the *present user* or physical grades of the roadway of old Central Avenue, except between Rutland Street and Glenham Street (a distance of 2 blocks), where they conform with the sidewalk improvements. *These grades were altered to facilitate the construction of the Manhattan and Queens Traction Corporation's railway ~~and~~*. There was necessarily a grading upon old Central Avenue to open it for traffic (p. 102). The first record of work done on said avenue is set forth on page 65, Resolution No. 2, of the proceedings of the Supervisors of Queens County for the year 1891, where mention is made of a number of roads to be improved by grading, regulating and macadamized to a width of 18 feet, and a depth to be recommended by the engineer and approved by the Board, *one of the roads being old Central Avenue from Farmer's Avenue to Springfield Avenue*. Mention is made on page 20 of

Supervisors' proceeding of 1893 of a payment of \$9,200.80 for highway improvements on Central Avenue and a further payment of \$827.85 for the same purpose appears on page 259 of the same year's proceedings (fol. 193).

According to Resolution No. 36, page 833 of the Proceedings of the Board of Supervisors, Queens County, 1896, old Central Avenue, from Farmer's Avenue to Merrick Road, was one of a number of streets to be graded and macadamized from a bond issue of \$450,000. (See affidavit of Frank B. Tucker, marked Exhibit "F," attached to City's answer (p. 102), and also see map attached thereto and made part thereof showing that the final City map grades and the physical grades existing on the street are practically the same.) (Map 6, p. 185.) (*The City laid a strip of concrete or asphalt on this avenue 18 feet wide* (p. 102).

The poles mentioned in paragraph XIV of the petition as being erected on Westchester Avenue and 117th Avenue (map 14, p. 193) are owned by the New York Telephone Company and the New York & Queens Electric Light & Power Co., and their existence on said avenues has not prevented the construction of the railway of the Manhattan and Queens Traction Corporation (pp. 117-119). The New York Telephone Company and the New York & Queens Electric Light & Power Co. are and have always been willing that said poles be removed so as to permit the construction of the railway of the said Traction Corporation. (See letter of P. D. Honeyman, Plant Supt., Exhibit "G," attached to City's answer (p. 105), and also a letter from the New York & Queens Electric Light & Power Co., dated February 14, 1918, Exhibit "H," attached to City's answer.) (pp. 106.)

The Borough President of Queens has made up a map

showing a location that he is willing to give to the said Traction Corporation for the construction of said line from Tutphin Road out to Springfield Road along said streets involved as mentioned in said contract of January 21, 1916. *This map shows that said railway ^{can} be constructed without interference with said poles, except in a few instances.* (See Maps 12, 13, 14; pages 191, 192 and 193.)

VI.

The Court of Appeals properly construed the contract in holding that the Board could proceed under the provisions of Section 5, Paragraph "Thirteenth" of the contract of October 29, 1912, as amended by the contract of January 21, 1916, to rescind by resolution this franchise contract for the failure of the Manhattan and Queens Traction Corporation to build and operate in compliance with Section 3, Paragraph "Seventh" thereof and the resolution of the Board made in conformity with the provisions of said paragraph.

For Sec. 5, Par 13th, see p. 5 hereof;

For Sec. 3, Par. 7th, see p. 16 hereof;

For resolution of Board, see p. 4 hereof.

(1) At the threshold of this discussion it should be noticed that the *tracks and equipment* over which this company operates *on the Queensborough Bridge and its approaches* are *City owned* (Franchise, sec. 2, par. 2) and the courts of our state have held that the right to operate over these is not a franchise.

N. Y. Rys. Co. v. Prendergast, 172 App. Div.
130;

Schinzel v. Best, 45 Misc. Rep. 455;

See sec. 4, par. "second" of contract (page 47).

The Bridge Commissioner has full cognizance and control over all bridges over navigable waters under the charter which jurisdiction is maintained under the provisions of this contract.

(Pp. 47 to 49.)

(1) The City grants the corporation in section 2 (p. 41) "the following rights and privileges". These are:

(1) A franchise for a railway from Queensborough Bridge to the City Line (pp. 38, 39).

(a) A right to operate cars on the Queensborough Bridge on City-owned tracks with City-owned equipment (p. 40).

The contract provided that the route "is to be operated by the company as a *continuous* route in connection with the right hereinbefore described".

To obtain efficient service for a single fare for the public, this franchise and right must be operated together and by the same company. The first right, which is a franchise, is subject to certain express conditions enumerated in section 3 (pages 40-47, inc.), among which is a self-executing forfeiture clause (section 3, paragraph "seven" of contract) (page 44, fol. 83).

The grant of the right to operate cars over the City-owned tracks, which is not a franchise, but a trackage agreement, is subject to certain other conditions as to payment, etc. (pages 47-49). Both this franchise right and trackage agreement privilege are subject to certain other conditions enumerated in section 5 (pages 49-57). Among these latter conditions is paragraph "thirteenth" (page 54) under which the Board was proceeding to pass the resolution enjoined by the

Court. This paragraph provides that in case of the corporation's failure to comply with any of the provisions "*herein contained*", this contract may be forfeited. The words, "*herein contained*" mean contained in the entire contract, and embrace the provisions of section 3, paragraph "seven", providing for construction within a fixed period and for cessation of the rights granted by the contract in case of a failure on the part of the corporation.

This is clear from the wording of other paragraphs in section 5 of the contract. The first paragraph of section 5 calls upon the company to pay "*for this privilege*", meaning the rights granted in section 2 (pg. 49). The "second" paragraph of section 5 forfeits any assignment of the rights "*hereby granted*" and of the "*routes mentioned herein*". No rights are granted and no routes mentioned in section 5. These words refer to rights granted by section 2. (p. 38.)

Section 5, paragraph "third" (pg. 51) speaks of "*the rights and privileges hereby granted.*" The grants here referred to are provided for in section 2.

Section 5, paragraph "fourth" (p. 51) provides: "On failure of the company to comply with the direction of the Board within a reasonable time, *the rights hereby granted* shall cease and terminate".

No such rights were granted by section 5—these rights were granted by section 2. (p. 51) (p. 38.)

Section 5, paragraph "sixth" (p. 52) mentions the railroad "*hereby authorized*", meaning the railroad granted by section 2. (p. 38.)

Section 5, paragraph "sixteenth" (p. 54) speaks of the rights "*conferred hereby*". These rights were granted by section 2 of the contract.

The appellants seem to contend that the employment of the words, "right" in the singular in section 3, paragraph "seventh", and in the plural in section 3, para-

graph "third" shows that the line was only forfeitable in sections. No rights are granted in section 3, but in section 2 we find the following paragraph:

"The City hereby grants to the company, subject to the conditions and provisions hereinafter set forth, the following rights and privileges:

*First: To construct, maintain and operate a street surface railway with the necessary wires and equipment for the purpose of conveying persons and property in the Boroughs of Queens and Manhattan of The City of New York, upon the following routes, to wit, * * **

*Second: To operate the cars of the company on two tracks when constructed upon the Queensborough Bridge * * *. (City tracks.)*

Section 3, par. "seventh", provides:—

"Upon the failure of the company to complete the construction and place in operation any of the said portions of the railway on or before the dates or times herein specified the right herein granted shall cease and determine."

The words, "the right herein granted", means the right granted by section 2, for a franchise from the Queensborough Bridge Plaza to the City Line, and includes the privilege over the bridge.

Section 3, paragraph "Third" (p. 42) was inserted to carry out the provisions of section 73 of the City Charter. (See page 197 hereof),—which takes care of the disposition of the company's physical property in the streets in case of the termination of the rights granted either on the bridge or from the bridge out to the City Line at any time. Section 73 of the Charter uses the words, "*Termination of the rights*". The word "*rights*" mentioned in this section refers to not only the franchise rights but also the rights of property in the streets.

The Court of Appeals properly construed this contract to hold that the word "right" in section 3, paragraph "Seventh" referred to the *entire franchise*, and for failure to construct any part of the line, the *whole franchise* could be forfeited by the Board. The corporation would be glad to enjoy the franchise out of the old town of Jamaica, which is the fat and profitable part of the line, and to discard the lean part from that point to the City Line, and thus leave the vast territory beyond the old town of Jamaica without transportation facilities. This is just what the City sought to avoid.

The Court of Appeals was also correct in holding that the Board could proceed under the provisions of section 5, paragraph "Thirteenth" of the contract to rescind the resolution granting the franchise on account of the failure of the company to construct, as provided for in section 3, paragraph "Seventh" of the contract. In other words, the Courts properly held that the words in section 5, paragraph "Thirteenth", to wit, "*herein contained*" mean contained in any of the sections of the contract, and that for failure to comply with any of the provisions of any of the sections of the contract, the whole contract could be forfeited by resolution of the Board or by suit brought by the Corporation Counsel.

(2) Rules governing construction of this contract.

A grant such as this railway franchise must be construed strictly and in favor of the public. Any ambiguity must operate against the grantee and in favor of the public.

Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562;

Mayor, etc. v. B'way, etc. R. R. Co., 97 N. Y. 275, 281.

"The principle however is fundamental that 'every public grant of property, or of privileges

or of franchises, if ambiguous is to be construed against the grantee and in favor of the public' (Cent. Transp. Co. v. Pullman Palace Car Co., 139 U. S. 34, 49; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 544)."

From opinion of Judge Cardoza in Holmes Elec. Protec. Co. v. Williams, 228 N. Y. 407, 447.

"As the act conveyed to it franchises and ~~specific~~ ^{special} privileges, its language must be construed most favorably to the people and all reasonable doubts in construction must be solved against the defendant. Words and phrases which are ambiguous, or admit of different meanings are to receive, in such case, that construction which is most favorable to the public (cases cited)."

People v. B. R. R. Co., 126 N. Y., 29, 36, 37.

(3) The Board had power to insert the forfeiture conditions in the franchise.

As we understand appellants' contention on pages 124 to 134 of their brief it is:—

That since Section 179 of the State Railroad Law (p. 194 hereof) fixed *one year* as the time for the commencement of construction of a street railway and *three years* as the time when it must be finished and further declared that if a street railway fail to live up to these provisions its franchise *may be forfeited*; the City could not legally require construction of a part of this railway in a shorter time or allow a larger period of time for construction. They seem to contend that such an agreement would be void as in conflict with the provisions of section 179 (p. 194 hereof). This statutory time runs from the time of obtaining the consents of the local authorities and property owners. The words of the statute "may be forfeited" are *not* self-executing. These words give solely *a ground for forfeiture* and would require a judgment in equity or at law to establish the forfeiture.

What the Board did in the contract in question was to impose a shorter term *in no way in conflict* with Section 179 of the Railroad Law, and a *self-executing* forfeiture clause as directed by Section 73 of the City Charter to secure the construction of the road and thereby transportation service to the people. (For Section 73, see p. 198 hereof). This act was within the power of the City.

Dusenberry v. N. Y. W. & C. Tr. Co., 46 App. Div., 267, 270, 271, 272.

On this subject, Hatch, J., said:

“* * * The public have the right to demand that, as they give a franchise valuable in character, their needs and necessities shall be accomplished as soon as reasonable diligence will permit. In many cases several corporations are supplants for a franchise, and it would be singular, indeed, if a community might not impose a condition by which its welfare would be promoted if it could find among those suing for the franchise one that would construct with more dispatch than the statute required, to prevent the working of a forfeiture. The controlling motive for the granting of a consent might be the speedy construction of the road, and to hold that a community might not impose such a condition would be to deny it the right to contract for the public interest. To claim that such a condition is against the interest of the community, and, therefore, void as against public policy, is to ignore the facts and vest in the railroad company power to defeat the very object which the interest of the community requires for its good.

It is to be borne in mind that no railroad company is required to take any franchise; no compulsory process can be issued which compels it to construct a railroad unless it voluntarily assumes such obligation. It does not commend itself to good morals to permit a corporation to accept a

franchise with a full understanding of its terms, and which it has been the moving party in obtaining, and then permit it to violate the condition upon which it was granted, deprive a community of that which it had the right to expect, inconvenience the public, and say that the condition imposed was void, as being against public policy.
* * *,"

The *Dusenberry* case was followed and approved in

Gaedeke v. Staten Island M. & R. R. Co., 43 App. Div., 514;

Farnsworth v. Boro Oil & Gas Co., 216 N. Y., 40;

South Shore Traction Co. v. Town of Brookhaven, 116 A. D., 749, 752;

Peo. ex rel. Frontier El. R. R. v. North Tonawanda, 70 Misc. Rep., 91; Order affirmed, 143 App. Div., 955.

(4) MOREOVER, THE CORPORATION IS NOW ESTOPPED FROM CONTESTING THE VALIDITY OF THESE CONDITIONS.

Southern Bell Telephone & Tel. Co. v. C. of Richmond, 98 Fed. 671, 673;

Farnsworth v. Boro Oil Gas Co., 216 N. Y., 40, 45, 46, 47;

Peo. ex rel. N. Y. W. & B. R. Co. v. P. S. C., 193 App. Div., 445, 453.

See cases cited on

In the *Southern B. T. and T. Co. v. Richmond*, the Court said:

"Having agreed with the city for reasons of its own, to terms, conditions, and restrictions of said ordinance, and for years having acquiesced in same, complainant should not now be permitted to

either deny its validity or escape its requirements" (*supra*, p. 673).

(5) This forfeiture clause does not conflict with, nor is it inconsistent with the provisions of the Charter or the Railroad Law and the state authorities are not against the legality of this clause.

Section 45 of the New York City Charter quoted by appellants on page 131 of their brief appears in Chapter II thereof and is entitled "Legislative Department". Matters pertaining to franchises appear under Chapter III of the Charter. In this Chapter, Title 1 refers to franchises and Title 2 refers to grants of land under water. Section 88 of Chapter III reads:

"All acts and parts of acts so far as they are inconsistent with this chapter are hereby repealed."

(p. 200 hereof.)

Sections 73 and 74 of Chapter III provide for terms and conditions in and to grants of franchises (see p. 173 hereof). This section reads in part:

"Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant."

Section 74 of Chapter III provides in part:

*"The board of estimate and apportionment shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and shall embody the result of such inquiry in a form of contract, with all the terms and conditions, including the provisions as to rates, fares and charges. * * *"*

Section 77 of Chapter III provides that Section 93 of the Railroad Law shall have no application to grants made under Chapter III.

Section 93 of the Railroad Law provided for "conditions upon which consents (municipal) shall be given and for the sale of franchises at public auction".

The *Beekman* case referred to on p. 127 of appellants' brief arose under a special act now carried into the provisions of Section 93 of the Railroad Law. The *Beekman* case was decided in the State Court of Appeals on June 8, 1897, which shows that the case arose previous to the institution of the Greater New York Charter, which became a law on May 4, 1897. The *Beekman* case, therefore, has no application to grants made under Chapter III of the City Charter.

This distinction has been pointed out in *Jacobs v. Hedges, Receiver of New York Railways Co.*, by Commissioner Harkness of the Public Service Commission of the State of New York (P. U. R., Vol. 1921-E, pp. 58 & 59). The distinction is in language as follows:

"Defendant, however, contends that the obligations attaching to the franchise are purely statutory and *that the legislature covered the whole subject and left nothing to the discretion of the common council which, therefore, had no authority to attach additional conditions.* It does not seem that the legislature did cover the whole subject or that the Common Council attached any additional conditions; but assuming that it did, the case of *Beekman v. Third Avenue R. Co.*, 153 N. Y. 144, 47 N. E. 277, on which defendant relies does not support its contention. *In that case, the franchise was granted under old Section 93 of the Railroad Law, but not under the part involved in the instant case. It was disposed of at public auction, and not, as here, without putting it up to bidding.* The court held that two extensions, one on the north and one on the south end of the existing route, could not be

put up as one franchise, and that the local authorities could not attach a requirement for a lump sum payment as a condition to a franchise which the statute required should be sold to the bidder of the highest percentage of the gross receipts. Such conditions were inconsistent with the statutory regulations, and not merely in addition thereto. In view of the provisions of Section 18, Article III of the Constitution, I think it cannot be said that an additional condition attached by the local authorities is illegal, where it is not inconsistent with, and does not violate the spirit of the regulations prescribed by the legislature. It seems that the local authorities must be free to impose conditions, except where the legislature has restricted the right expressly or by implication."

The case entitled *City of Troy v. United Traction Co.*, 202 N. Y., 333 (Plaintiff's brief, p. 127) simply holds that a Common Council of a City cannot by resolution nullify an order of the State Public Service Commission in regulatory matters. This decision approves of the custom of placing cautionary conditions in franchises to safeguard the public interests. The Court said:

"We think, however, that the danger of these anticipated abuses is more imaginary than real. *If municipalities when granting such consents will hedge them about with proper conditions individuals will not rashly or carelessly ask for franchises which they cannot hope to use.*"

In view of these statutes, decisions and sections of the City Charter, it clearly appears that the self-executing forfeiture provision in Section 3, Paragraph "Seventh" and the procedure for forfeiture outlined in Section 5, Paragraph "Thirteenth" are legal in form and substance and enforceable and that the corporation will not now be heard to deny their validity.

(6) Neither the proposed action of the Board nor the form or substance of the repealing provision of the contract would violate the Constitution of the United States or any of its amendments.

This self-executing forfeiture clause does not violate the *due process clause* of the Federal Constitution. A self-executing forfeiture provision in a franchise is regarded as resulting in a loss of entity—not a forfeiture.

It has been held that a provision of law authorizing the Governor to declare a charter forfeited does not violate the Fourteenth Amendment.

Held v. Crosthwaite, 260 Fed. Rep. 613, 624.

Nor was notice of the intention of the Board to pass the resolution under Section 3, Paragraph Seventh, directing the company to construct, essential.

Health Department v. Rector, 145 N. Y. 32;

San iDego Land Co. v. Nat. City, 174 U. S., 739;

Public Clearing House v. Coyne, 194 U. S., 497.

In the *Public Clearing House case v. Coyne* (*supra*) the Court said:

“Due process of law does not necessarily require the interference of judicial power, nor is it necessarily denied because the disposition of property is effected by the order of an executive department.”

(7) Nor were court proceedings required to annul this franchise.

Schlesinger v. Kansas City, etc. Ry. Co.,
152 U. S. 444;

Rannels v. Rowe et al., 145 Fed. 296;
Oregon R. R. and Nav. Co. v. McDonald, 32
 L. R. A. (N. S.) 117; 112 Pac. 413;
U. S. v. Oregon, etc. R. R. Co., 186 Fed. 861,
 933.

The latter case was approved in

U. S. v. Van Horn, 197 Fed. 611, 616;

In *Schlesinger v. Kansas City, etc. Ry. Co. supra*, there was a question of forfeiture of a grant of land which provided that the railroad company should construct within a given time, and on its failure to do so, that the granted estate should revert to the grantor. The Supreme Court held that there was no necessity for court proceedings to declare a forfeiture in this case. The opinion of Mr. Justice Harlan on this point, at page 453, reads:

"It was not necessary to the reacquisition of title by the trustees that they should invoke the aid of the courts. *In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made. But judicial proceedings to that end are not absolutely necessary*, unless they are prescribed by the grant itself; for where land and franchises are held upon conditions to be subsequently performed, 'any public assertion by legislative act of the ownership of the estate after default of the grantee—such as an act resuming control of them and appropriating them to particular uses or granting them to others to carry out the original object—will be equally effectual and operative.' *Farnsworth v. Minnesota & Pacific Rail-*

road, 92 U. S. 49, 66, 67; *Pacific Railroad v. United States*, 124 U. S. 124, 130. In the case of a private grant, an entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage by the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required. What was done by the trustees, Hanna, McLean and Bancroft evinced, in the clearest possible manner, their purpose to reclaim the property and rights granted to Brooks, because of the failure to perform the condition upon which he, or any one claiming under him, was entitled to hold the property."

In *Oregon R. and Nav. Co. v. McDonald* (*supra*), where the Oregon Supreme Court had to do with the condition in the grant of a right of way to a railroad company that the line should be completed within a specified time, the Court held that the failure to live up to the condition forfeited the grant. At page 123, McBride, J., said:

"Defendants were unwilling to sell a strip of land across their farm, and allow the railroad company to hold it indefinitely to the detriment of the balance of their holdings and to the possible exclusion of some other line of road. They wanted the road built within two years, or they wanted their land back. Plaintiff, feeling confident that it could complete the road within that time, took the deed with the condition annexed to it. Owing, primarily, to the money panic, and secondarily, to weather conditions, they failed to comply with the conditions, which no doubt seemed reasonable enough when the deed was made. Financial stringency has caused many people in this country to forfeit profitable contracts, but the courts cannot compel the beneficiaries of such contracts to be generous and extend the time for performance."

In *United States v. Oregon etc., R. R. Co. et al.*, *supra*, the syllabus (sub-heading 10) reads:

"In the case of the Legislative grants of public lands imposing conditions along therewith upon the grantee in relation to the thing granted, *the acts conferring them ought to be construed as laws, and the technical rights governing the interpreting of contracts are inapplicable*; the single inquiry being as to the intent of the one party—the Legislative intendment in promulgating the law. If there is ambiguity or uncertainty in an act granting public lands to private individuals or corporations, it should be construed most favorably to the government." (Sub-heading 11.)

Whether this forfeiture clause (Section 3, paragraph seventh) is a condition subsequent or a covenant is irrelevant here, for the reason that there is a provision in the contract for re-entry (Section 5, paragraph thirteenth), and also for the reason that there is a special provision that in case of failure to construct the right shall cease and terminate. *There is an immediate right of re-entry.*

Munro v. Syracuse L. S. & H. R. R. Co., 200 N. Y., 224, 231.

The Court of Appeals properly construed the franchise in holding that the Board had a right to proceed under sec. 5, par. "Thirteenth" to repeal it for failure of the grantee to construct under it as provided for in sec. 3, par. "Seventh".

VII.

The City is not estopped from taking action under sec. 5, par. "Thirteenth" of the contract of October 29, 1912, as amended through the acceptance by municipal employees of payments from the corporation.

If the City were proceeding under Sec. 3, Par. "Seventh" of this contract, the company could advance this estoppel argument with some force, but not when the City is proceeding under Sec. 5, Par. "Thirteenth."

On the return day of the notice (p. 4 hereof) the Board might have extended the time of the company to build after a hearing and upon a renewed condition.

The City certainly did not estop itself from holding a hearing on the question whether a failure to construct was justified.

The City did not waive its right to proceed under Sec. 5, Par. "Thirteenth."

In *Clark v. West*, 193 N. Y., 349, 360-361, waiver and estoppel have been clearly defined in the following language:

"A waiver has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon (cases cited). * * *

"While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is a voluntary abandonment or relinquishment by a party of some right or advantage. * * *

"The law of waiver seems to be a technical doctrine introduced and applied by the Court for the purpose of defeating forfeitures. * * *

"While the principle may not be easily classified, it is well established that if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to aban-

don or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked.' The doctrine of equitable estoppel, or estoppel *in pais*, is that a party may be precluded by his acts and conduct from asserting a right to the detriment of another party, who, entitled to rely on such conduct, has acted upon it. * * * As already said, the doctrine of waiver is to relieve against forfeiture; it requires no consideration for a waiver, nor any prejudice or injury to the other party. * * *

One of the elements of waiver, as above defined, is that the parties must have knowledge of the right waived, and another principle is that it must rest upon the meeting of the minds or the assent of the parties. Waiver is a contract similar to any other implied contract.

It is a well recognized principle of law that subordinates of a municipal government have no power to waive the rights of the public or of the municipality.

Chanslor-C-M-Oil Co. v. U. S., 266 Fed., 145, 150; *Certiorari denied*, 254 U. S., 664;
City of New York v. N. Y. C. Ry. Co., 126 App. Div., 36, 38, *aff'd* 193 N. Y., 680;
Holmes Elec. Protective Co. v. Williams, 228 N. Y., 407, 419, 439;
City of Mount Vernon v. N. Y., N. H. & H. R. Co., 232 N. Y., 309, 316, 318;
Ghee v. Northern Union Gas Co., 158 N. Y., 510, 516;
Flatbush Gas Co. v. Coler, 190 N. Y., 268;
Matter of West Side Electric Co., 187 N. Y., 58;
People v. Ostrander, 144 App. Div., 862;
Wells v. Johnson, 171 N. Y., 324;

Wisconsin Central R. R. v. U. S., 164 U. S., 190;

U. S. v. Gilmore, 189 Fed., 762;

U. S. v. U. S. Fidelity and G. Co., 151 Fed. Rep., 534, 537;

Dillon on Municipal Corporations, 5th ed., Sec. 951, 1194, 1187, 1267.

In the Chanslor C— case the Court said:

“The United States is not estopped by acts of its officers or agents, and as a general rule their ~~leases~~ or negligent ~~is~~ no defense to a suit by the government to enforce a public right or protect a public interest” (syllabus).

In the Holmes case Judge Crane at p. 419, said that the payment of taxes and also monies to subway commissioners did not establish an estoppel against the City and Judge Pound, at p. 439, said:

“Shall plaintiff obtain a state or local franchise through inadvertance? The thing is impossible. Neither the performance of conditions nor the payment of taxes by plaintiff will give validity to the unauthorized acts of the public officials with which it dealt.”

In *U. S. v. U. S. Fidelity & G. Co.* (*supra*), it was held that a government or municipal corporation is not bound by the mistakes of its officers whether of law or fact (p. 537).

In *Wells v. Johnson* (*supra*), it was held that the State was not bound by the unauthorized acts of its agents.

In *People v. Ostrander* (*supra*), it was said:

“Of course the State cannot be estopped by unauthorized acts of agents.”

Receipt of monies by the administrative officers of the City, in the course of the City's business, could not estop the Board of Estimate and Apportionment from enforcing the terms of that contract.

VIII.

Courts of equity should not grant relief from forfeitures where by agreement a specific act is to be done within a stipulated time and such time is of the essence of the contract.

The Corporation by the terms of the contract and the notice of the Board was obliged to have completed the construction of this section of the road and have same put in operation out to Springfield Road on August 23, 1917, and as time is of the essence of this contract equity will not relieve from the default of the corporation.

See Section 3, Par. "Seventh", p. 17 hereof.
See Notice, p. 4 hereof.

Oregon & Cal. R. R. v. U. S., 238 U. S. 393, 436;

Clarke v. Bernard, 108 U. S. 436;

Pierce v. New York Dock Co., 265 Fed. Rep. 148, 156.

See cases on self-executing forfeitures on p. 101 hereof.

In *Oregon & Cal. R. R. v. U. S.*, 238 U. S. 393, 436, which concerned the failure of the Railroad to live up to a congressional grant the Court, speaking through McKenna, J., said:

"It (judgment) is determined by the simple words of the act of congress not *only* regarded as

*grants but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second of performance; and as we pointed out, whatever the difficulties of performance, relief could have been applied for and it might be, have been secured through an appeal to congress. Certainly evasion of the laws or defiance of them should not have been resorted to. * * * We have seen that one company failed under the burdens which it assumed. The other company took it up and struggled for years under it and its own burden. It may indeed have finally succeeded by a disregard of the provisos. It might however have succeeded by a strict observance of them. We are not required to decide between the suppositions. We can only enforce the provisos,, as written, not relieve from them."*

If the forfeiture has occurred through the operation of the self-executing forfeiture clause the *franchise is now non-existing,—dead; and the courts cannot grant this corporation a new franchise or restore to life that which has ceased to exist.* Even the state legislature could not restore this franchise *without the consent of the local authorities and property owners* under sec. III, art. 18 of our State Constitution (p. 175 hereof).

Matter of Brooklyn, Queens County and
Suburban Railroad against City of New
York, 185 N. Y. 171.

Approved in *Held v. Crosthwaite et al.*, 260
Fed. 613, 624.

It could not be contended, with any show of reason, that a Court should *grant a mandamus* in the circumstances, to compel the issuance of a municipal permit to this company for construction in the public street if the City objected to such construction.

Public Service Commission for the First District against Richmond Light and Railroad Company, 108 Misc. 724, 727; Aff'd. 188 A. D. 970;

Mechanicville and Ft. E. R. R. Co. against F. R. R. Co., 103 Misc. 46, 51; Aff'd. 190 App. Div. 887.

In *Public Service Commission, etc. against R. L. & R. I. Co.*, which had to do with the forfeiture of a railroad franchise, Kelly, Judge, said:

"If the defendant to-day applied for a mandamus to compel the authorities of the city of New York to grant a permit to open the streets for the purpose of constructing this additional railroad, on these new lines, the court, in my opinion, would be obliged to deny it under *Matter of Brooklyn, Queens County & Suburban R. Co.*, 185 N. Y. 171. I tried that case at Special Term, and the refusal of the mandamus was affirmed by the Appellate Division (106 App. Div. 240) and the Court of Appeals."

In *Mechanicville & Ft. E. R. R. Co. v. F. R. R. Co.*, Van Kirk, J., referring to a forfeiture clause similar to the one in question, said:

"This provision of the statute is self-operating; by failing to comply with this provision of the statute the corporation became extinct and no judgment or order of the court is required to accomplish a forfeiture of all its corporate rights and powers. *Matter of Brooklyn, W. & N. R. Co.*, 72 N. Y. 245; 75 id. 335; *Matter of Brooklyn, Q. C. & S. R. R. Co.*, 185 id. 171; *Farnham v. Benedict*, 107 id. 159; *Goelet v. Metropolitan Transit Co.*, 48 Hun, 520; *Brooklyn & R. B. R. R. Co. v. Long Island R. R. Co.*, 72 App. Div. 496; *Matter of Brooklyn, W. & N. R. Co.*, 19 Hun, 314."

A railroad ^{Franchise} once forfeited can ^{not} ~~only~~ be restored unless by the grant of a new consent issued in conformity with the provisions of Article III, Section 18, of the State Constitution, which requires the *consent of the local authorities and property owners* before the construction of a street railroad can be undertaken in a public highway. (p. 175 hereof.)

*Matter of Brooklyn, Queens County and
Suburban Railroad Company, supra.*

A forfeiture clause such as that contained in Section 3, paragraph "Seventh" of the contract of October 29, 1912, as amended January 21, 1916, *does not violate the due process clause of the State and Federal Constitutions.*

IX.

Meaning of the words "railway constructed and in use" by virtue of the contract of October 29, 1912, as amended and reason for and history of sec. 3 paragraph "Third" in the contract.

The resolution of the Board (page 28, folio 51; page 4 hereof) reads in part:

" * * * and why such resolution shall not provide *that the railway constructed and in use by virtue of said contracts shall thereupon become the property of The City of New York without proceedings at law or in equity; and be it further*
" * * * "

This notice was drafted in strict conformity with Section 3, paragraph "THIRD" of the contract which reads:

"THIRD—Upon the *termination of this original contract*, or if the same be renewed, then at the *termination of the said renewal term or upon the termination of the rights hereby granted for any*

cause, or upon the dissolution of the Company before such termination, the tracks and equipments of the Company constructed pursuant to this contract within the streets and avenues shall become the property of the City without cost, and the same may be used or disposed of by the City for any purpose whatsoever, or the same may be leased to any company or individual.

If, however, at the termination of this contract as above, the Board shall so order by resolution, the Company shall, upon thirty (30) days' notice from the Board, remove any and all of its tracks and other equipment constructed pursuant to this contract and the said streets and avenues shall be restored to their original condition at the sole cost and expense of the Company."

This paragraph "THIRD" was inserted in the contract of October 29, ¹⁹¹¹~~1921~~, in compliance with the mandatory provisions of Section 73 of the City Charter which reads in part:

"* * * At the termination of any franchise or right granted by the board of estimate and apportionment *all the rights or property of the grantee* in the streets, avenues, waters, rivers, parkways and highways *shall cease without compensation*. Every such grant of a franchise and every contract made by the city in pursuance thereof *may provide* that upon the termination of the franchise or right granted by the board of estimate and apportionment *the plant of the grantee with its appurtenances shall thereupon be and become the property of the city without further or other compensation to the grantee*; or such grant and contract may provide that upon such termination there shall be a fair valuation of the plant which shall be and become the property of the city on the termination of the contract on paying the grantee such valuation. If by virtue of the grant or contract the plant is to become the city's *without money payment therefor, the city shall have*

the option either on its own account, or to lease the same for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same as property, excluding any value derived from the franchise; and if the city shall make payment for such plant it shall in that event have the option either to operate the plant and property on its own account or to lease the said plant and property and the right to the use of streets and public places in connection therewith for limited periods, in the same or similar manner as it leases the ferries and docks. Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for. (As amended by L. 1905, ch. 629, §11.)"

The purpose of Section 73 of the City Charter and Section 3, paragraph "THIRD" of the contract was to eventually bring about for the benefit of the people the ownership of their own utilities in keeping with the spirit and policy of the illustrious committee who framed the Greater New York Charter.

The report of the Committee on Draft of the Charter is dated December 24, 1896, and was made to the Greater New York Commission on Consolidation. The recommendation of this committee in this draft on *municipal ownership*, is as follows:

"MUNICIPAL OWNERSHIP.

"There is naturally a diversity of opinion in the Committee upon this subject. *From an original and ideal standpoint* it is easy to see that the

City would become the recipient of vast revenues by the ownership and operation of all franchises for lighting by gas or electricity and for tramways and other purposes necessary to the life and business of a metropolitan community and exercised so largely by a use of the streets and revenues belonging to the people. Nor could any one well deny the right and power of the people to embark in such enterprises. If the subject were up originally, as it was in Glasgow and in some of the new cities of this country, it could easily be treated upon first principles. In The Greater New York, however, *private capital has, upon the faith of the State, embarked largely in such franchises.* It would take a sum too vast to be hastily computed to acquire the properties thus vested in private persons, by fair compensation. The aggregate would greatly exceed the limitation put upon City indebtedness by the State Constitution. *We have, therefore, concluded not to deal radically with the subject in the body of the present Draft, but to leave the larger aspects of it to any special measure which the Commission of the Legislature may think wise to adopt. We have, however, provided for the future that all franchises operated principally by the use of the public streets should be granted by way of a lease for a period not exceeding twenty-five years, and in the meantime for full municipal supervision and regulation, with the option of renewal for a like period upon a revaluation, with a reverter to the city at the end of the term.* Precluded by the reasons stated from dealing with the subject originally in the Draft, we can think of no better or wiser method, under the circumstances, for securing to the City proper revenue from these sources, and, if desirable, ultimate title to the product of future franchises.

WILLIAM C. DE WITT, *Chairman.*
 JOHN F. DILLON,
 THOMAS F. GILROY,
 SETH LOW,
 GEORGE M. PINNEY, Jr.,
 BENJAMIN F. TRACY,
Committee on Draft."

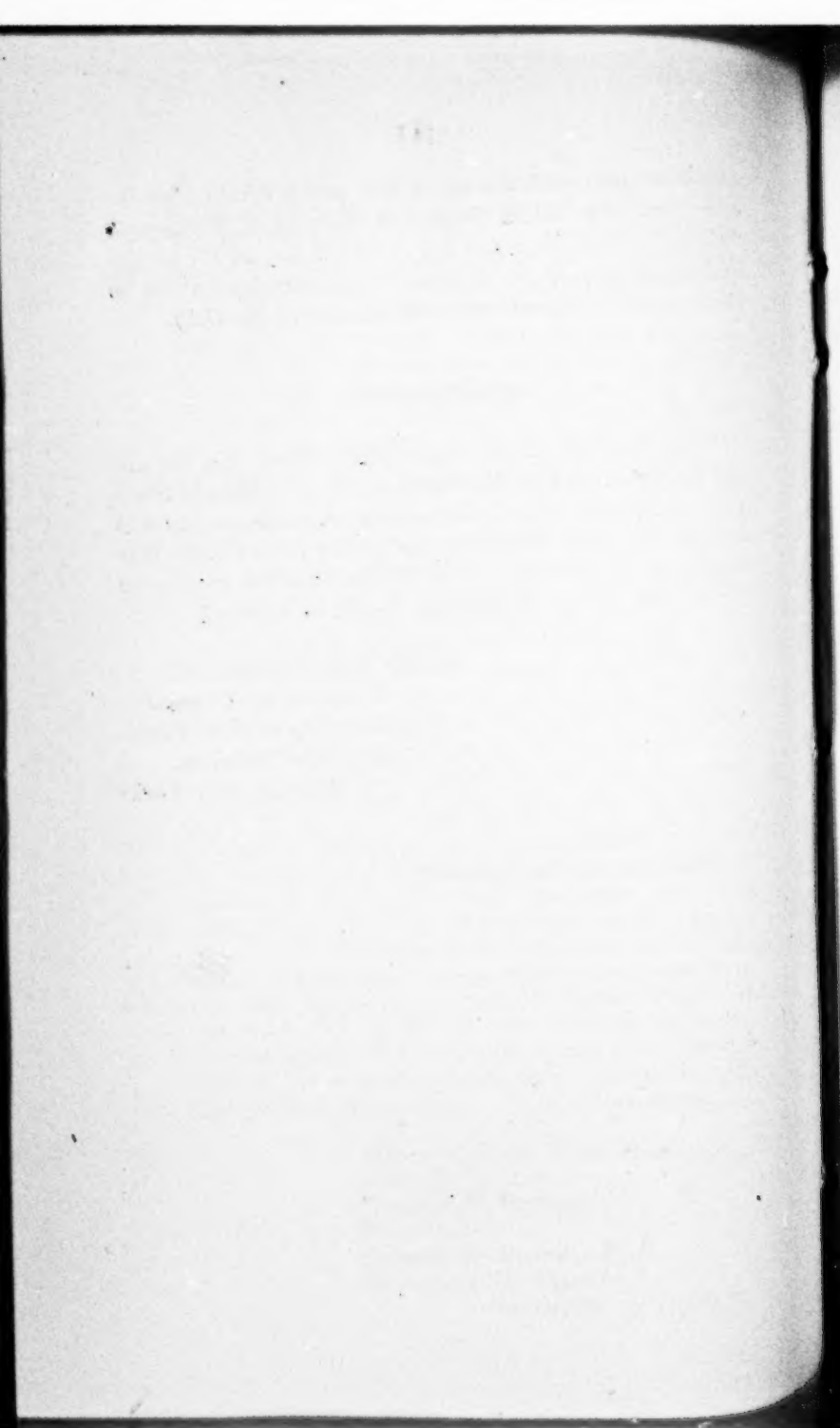
In keeping with the spirit and policy of the Charter and committee which framed it, Section 3, Paragraph "third," should be construed as embracing all the tracks and equipment of the company constructed pursuant to the contract in the streets and avenues of the City.

CONCLUSION.

Wherefore appellees respectfully submit that the appeal herein should be dismissed on the ground that there is no jurisdiction in this Honorable Court to entertain it and in the event that this motion be denied, and this appeal be considered on the merits, that the Decree of The Circuit Court of Appeals should be affirmed.

JOHN P. O'BRIEN,
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Municipal Building,
City of New York.*

VINCENT VICTORY,
Solicitor for the Appellees.



APPENDIX 1.**MINUTES OF THE BOARD OF ESTIMATE
AND APPORTIONMENT OF THE CITY
OF NEW YORK OF JULY 15, 1912
(p. 3479)**

**SOUTH SHORE TRACTION COMPANY
MANHATTAN AND JAMAICA RAILWAY
COMPANY**

"The public hearing was opened on the *form of contract* modifying contract, dated *May 20, 1909*, granting a franchise to the *South Shore Traction Company* to construct, maintain and operate a street surface railway in the Boroughs of Manhattan and Queens, from the westerly terminal of the Queensboro Bridge to the boundary line between the City and Nassau County by way of the Queensboro Bridge and various streets and avenues in the Borough of Queens.

The hearing was fixed for this day by resolution adopted June 13, 1912.

"Affidavits of publication were received from the "New York Times," "New York Press" and "The City Record."

"At the meeting of June 13, 1912, a report was received from the Franchise Committee recommending that the Board consent to the assignment of said contract when modified to the Manhattan and Jamaica Railway Company.

John O'Donnell appeared in opposition to the proposed route.

"The following appeared in favor of the proposed grant: Arthur Carter Hume, counsel for the company; John Adikes, Thomas F. Dwyer and William Rylance. No one else desiring to be heard, the Chair declared the hearing closed.

The following was offered:

"RESOLVED, That the Board of Estimate and Apportionment hereby grants to the South Shore Traction Company the franchise or right fully set out and described in the following form of proposed contract for the grant thereof, embodying all of the terms and conditions, including the provisions as to rates, fares and charges, upon and subject to the terms and conditions in said proposed form of contract contained, and that the Mayor of The City of New York be and he hereby is authorized to execute and deliver such contract in the name and on behalf of The City of New York, as follows, to wit:"

Here follows proposed form of contract, which is identical with the contract of October 29th, 1912, appearing on pages 37 to 60 of the Record except that it is unexecuted.

Which was adopted by the following vote:

"Affirmative—The Mayor, the Comptroller, the President of the Board of Aldermen, the Presidents of the Boroughs of Manhattan and Brooklyn, the Acting President of the Borough of The Bronx, and the Presidents of the Boroughs of Queens and Richmond—16."

APPENDIX 2

STATE CONSTITUTION,

Amendment of 1875

ARTICLE III, § 18. Private or local bills, when prohibited; general laws to be passed; street railroads, conditions relating thereto. The Legislature shall not pass a private or local bill in any of the following cases:

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Providing for public bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State.

The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws. *But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.*

APPENDIX 3

RAILROAD LAW

CHAPTER 49 OF THE CONSOLIDATED LAWS AND CHAPTER 481 OF THE LAWS OF 1910 IN EFFECT JULY 14, 1910, AS AMENDED TO JANUARY 1, 1918.

ARTICLE 2

ORGANIZATION, GENERAL POWERS AND LOCATION.

"§8. Additional powers conferred. Subject to the limitations and requirements of this chapter and of the public service commission's law every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

• • •

5. Intersection of other railroads. To cross, ~~inter~~^{cross}, join, or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its connections."

• • •

§ 9. Certificate of convenience and necessity. No railroad corporation formed after May eighteenth, eighteen hundred and ninety-two, under the laws of this state, shall exercise the powers conferred by law upon such corporations or begin the construction of its road until the directors shall cause a copy of the certificate of incorporation to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks, and shall file satisfactory proof thereof with the public service commission; nor until the commission shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity

*require the construction of said railroad as proposed in said certificate of incorporation. The foregoing certificate shall be applied for within six months after the completion of the three weeks' publication hereinabove provided for * * *.*

§ 21. **Railroads along highways.** No railroad corporation shall erect any bridge or other obstruction across, in or over any stream or lake, navigated by steam or sail boats at the place where it may be proposed to be erected, except as hereinafter provided, nor shall it construct its road in, upon or across any street of any city without the assent of the corporation of such city * * *. Every railroad corporation which shall build its road along, across or upon any stream, watercourse, street, highway, plank-road or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plank-road and turnpike, thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway, turnpike or plank-road may be carried by it, under or over its track, as may be found most expedient. In all cases where a railroad crosses a highway at grade, the corporation owning or operating such railroad shall construct and maintain a roadway at least sixteen feet wide. Such roadway shall be constructed by planking, or equally serviceable material for making a permanent roadbed, which shall extend at least one foot outside of the outside rails through and across the entire space between the rails at such crossing. Where an embankment or cutting shall make a change in the line of such highway, turnpike or plank-road desirable, with a view to a more easy ascent or descent, it may construct such highway, turnpike or plank-road, on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary. Such lands so taken shall become part of such intersecting highway, turnpike or plank-road, and shall be held in the same manner and by the same tenure as the adjacent parts of the highway, turnpike or plank-road are held for highway purposes * * *.

“§ 12. When corporate powers to cease.

If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road and expend thereon ten per centum of the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing such certificate, its corporate existence and powers shall cease; * * *

§ 22. Proceedings to determine point at which a new railroad shall intersect one already established; compensation; duties of intersecting roads.

Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor. If the two corporations can not agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the consideration law. Such commissioners may determine whether the crossing or crossings of any railroad before construction shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall hereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandise and other property, received at or forwarded from the same point for individuals and other corporations.

**GRADE CROSSING ACT: CHAPTER 754
OF THE LAWS OF 1897 WHICH WITH
AMENDMENTS ADDED SECTIONS 60 TO 68
TO THE RAIDROAD LAW—NOW SECTIONS
89 TO 101 OF SAME LAW.**

§ 89. **New railroads across streets.** All steam surface railroads built after the first day of July, eighteen hundred and ninety-seven, except additional switches and sidings, must be so constructed as to avoid all public crossings at grade, whenever practicable so to do. Whenever application is made to the public service commission under section nine of this chapter there shall be filed with the commission a map showing the streets, avenues, highways and roads proposed to be crossed by the new construction, and the commission shall determine whether such crossings shall be under or over the proposed railroad, except where the commission shall determine such method of crossing to be impracticable. Whenever an application is made under this section to determine the manner of crossing, the commission shall designate a time and place when and where a hearing will be given to such railroad company, and shall notify the municipal corporation having jurisdiction over the streets, avenues, highways or roads proposed to be crossed by the new railroad. The commission shall also give public notice of such hearing in at least two newspapers, published in the locality affected by the application, and all persons owning land in the vicinity of the proposed crossing shall have the right to be heard. Upon such a notice and after a hearing, the public service commission may determine that alterations or changes may be made in any existing highway, at or in the vicinity of a proposed crossing for the purpose of avoiding a crossing at grade.

The decision of the commission rendered in any proceedings under this section shall be communicated,

within twenty days after final hearing, to all parties to whom notice of the hearing in said proceedings was given, or who appeared at said hearing by counsel or in person.

[§ 89 thus amended by L. 1914, ch. 378; in effect April 16, 1914.]

§ 90. **New streets across railroads.** When a new street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road, or a state or county highway or county road deviating from the line of an existing highway or road, shall hereafter be constructed *across a steam surface railroad*, other than pursuant to the provisions of section ninety-one of this chapter, such street, avenue, highway or road or portion of such street, avenue, highway or road, shall pass over or under such railroad or at grade, as the public service commission shall direct. Notice of intention to lay out such street, avenue, highway, or road, or new portion of a street, avenue, highway or road, across a steam surface railroad shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue, highway or road by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. In case of the construction of a state or county highway which deviates from the line of an existing highway across a steam surface railroad, a like notice shall be given to such railroad company by the state commission of highways at least fifteen days prior to the adoption of the maps, plans and specifications for such state or county highway by such commission. Such notice shall designate the time when and place where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road, or before the state commission of highways in case of a state or county highway, on the

question of the location of such highway. If the municipal corporation determines such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be necessary, or if the state commission of highways determines that such state or county highway which deviates from the line of an existing highway shall be constructed across such railroad at the place indicated in the maps, plans and specifications therefor, such municipal corporation or commission of highways shall then apply to the public service commission before any further proceedings are taken, to determine whether such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall pass over or under such railroad or at grade. *The public service commission shall thereupon appoint a time and place for hearing such application, and shall give such notice thereof as it shall judge reasonable, not however less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, to the state commission of highways, or in the case of a state or county highway which deviates from the line of an existing highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue, highway or road to be opened, extended or constructed. The public service commission shall determine whether such street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, or state or county highway shall be constructed over or under such railroad or at grade.* If said commission shall determine that such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall be carried across such railroad above grade, then said commission shall determine the height, the length and the material of the bridge or structure by means of which such street, avenue, highway or road or new portion or additional

width of such street, avenue, highway or road shall be carried across such railroad, and the length, character and grades of the approaches thereto. *If said commission shall determine that such street, avenue, highway or road shall be constructed or extended below the grade, said commission shall determine the manner and method in which the same shall be so carried under, and the grade or grades thereof, and if said commission shall determine that said street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall be constructed or extended at grade, said commission shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained.* The decision of the commission as to the manner and method of carrying such new street, avenue, highway or road, or new portion or additional width of a street, avenue, highway or road, or state or county highway which deviates from the line of an existing highway, across such railroad shall be final, subject however to the *right of appeal* hereinafter given. The decision of said commission rendered in any proceeding under this section shall be communicated within *twenty days* after final hearing to all parties to whom notice of the hearing of such proceeding was given, or who appeared at such hearing by counsel or in person.

[Thus amended by L. 1914, ch. 378; in effect April 16, 1914.]

§ 91. Petition for alteration of existing crossing. The mayor and common council of any city, the president and trustees of any village, the town board of any town, the board of supervisors of any county within which a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road crosses or is crossed by a steam surface railroad at grade, below or above grade by structures heretofore constructed, or any steam surface railroad company, whose road crosses or is crossed by a street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road at grade,

below or above grade, may bring their petition in writing to the public service commission, therein alleging that public safety requires an alteration in the manner of such crossing, its approaches, the method of crossing, the location of the crossing, a change in the existing structure by which such crossing is made, the closing and discontinuance of a crossing and the diversion of the travel thereon to another street, avenue, highway, road or crossing, or if not practicable to change such crossing from grade, below or above grade or to close or discontinue the same, the opening of an additional crossing for the partial diversion of travel from the grade below or above grade crossing, and praying that the same may be ordered. Where a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road in a city, village, town or country, which crosses or is crossed by a steam surface railroad at grade, below or above grade, is a part of a highway which the state commission of highways shall have determined to construct or improve as a state or county highway, as provided in article six of the highway law, such commission of highways may bring a petition containing any of the allegations above specified and praying for a like order. Upon any such petition being brought the public service commission shall appoint a time and place for hearing the petition, and shall give such personal notice thereof as it shall judge reasonable, of not less than ten days, however, to such petitioner, the railroad company, the municipality in which such crossing is situated, and if such crossing is in whole or part in an incorporated village having not to exceed twelve hundred inhabitants, also to the supervisor or supervisors of the town or towns in which such crossing is situated; and in all cases to the owners of the lands adjoining such crossing and adjoining that part of the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be changed in grade or location, or the land to be opened for a new crossing, and to the state

commission of highways in case of a state or county highway. The public service commission shall cause notice of said hearing to be advertised in at least two newspapers published in the locality affected by the application. Upon such notice and after a hearing the public service commission shall determine what alterations or changes, if any, shall be made. If the application be made by the state commission of highways in respect to a street, avenue, highway or road or new portion or additional width of a street, avenue, highway or road proposed to be constructed or improved as a part of a state highway, the decision shall state whether such highway shall cross such railroad above or below the grade of the highway; in case of a county highway, such decision shall state whether such highway shall cross such railroad at grade, or above or below the grade of the highway. The decision of said public service commission rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person. Any person aggrieved by such decision, or by a decision made pursuant to sections eighty-nine and ninety hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated, and to the court of appeals, in the same manner and with like effect as is provided in the case of appeals from an order of the supreme court.

[Thus amended by L. 1914, ch. 378; in effect April 16, 1914.]

§ 92. Acquisition of land, right or easement in crossing. *The municipal corporation having jurisdiction over the street, avenue, highway or road and in which the crossing is located, or the state commission of highways in case of a street, avenue, highway or road to be constructed or improved as a part of a state or county highway, may with the approval of the*

railroad company acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter, but if unable to do so shall acquire such lands, rights or easements by condemnation either under the condemnation law or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein.

[Thus amended by L. 1913, ch. 744; in effect May 26, 1913.]

§ 93. **Repair of bridges and subways at crossings.** When a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated; except that in the case of any overhead bridge constructed prior to the first day of July, eighteen hundred and ninety-seven, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligation shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the town superintendent of highways or other duly constituted authority, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the services of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated. In case such highway is a part of a state or county highway constructed or improved as provided in article six of the highway law, the roadway over such railroad or the subway underneath the same, and the approaches thereto, shall be

maintained and kept in repair under the supervision and control of the state commission of highways in the manner provided by the highway law for the maintenance and repair of state and county highways where such roadway, subway or approaches, or any of them, have been constructed or improved as a part of a state or a county highway.

[Thus amended by L. 1916, ch. 484; in effect May 9, 1916.]

§94. Expense of constructing new crossings. 1. Whenever under the provisions of section eighty-nine of this chapter, a new railroad is constructed across an existing highway, the expense of crossing above or below the grade of the highway including any expense incurred in altering or changing the highway under a determination of the public service commission shall be paid entirely by the railroad corporation.

2. *Whenever under the provisions of section ninety of this chapter a new street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation having jurisdiction over such street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road shall pay the remaining one-half of the expense of making such crossing above or below the grade of the railroad.*

3. Whenever a change is made as to an existing crossing or structure in accordance with the provisions of section ninety-one of this chapter, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation and twenty-five per centum by the municipal corporation and twenty-five per centum by the state; except that whenever an existing crossing, in which a change is made under the provisions of section ninety-one, is located wholly or partly within an incorporated village having not to exceed twelve hundred inhabitants,

the portion of expense herein required to be borne by the municipal corporation shall be borne by the town or towns in which such crossing is situated.

4. Whenever under the provisions of sections ninety and ninety-one of this chapter a highway is constructed across an existing railroad and is a part of a state or county highway constructed or improved as provided in the highway law, one-half of the expense of making such crossing above or below grade or changing or rebuilding the existing structure by which such crossing is made, shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the state in the case of a state highway, and jointly by the state, county and town in the case of a county highway, in the same proportion and in the same manner as the cost of construction or improvement of such state or county highway is paid.

5. Whenever in carrying out the provisions of sections ninety or ninety-one of this chapter two or more lines of steam surface railroad, owned and operated by different corporations, cross a highway at a point where a change in grade is made, each corporation shall pay such proportion of fifty per centum of the expense thereof as shall be determined by the public service commission.

6. *In carrying out the provisions of sections eighty-nine, ninety and ninety-one of this chapter the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision and approval of the public service commission; and in all cases, except where the entire expense is paid by the railroad corporation, the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements shall be paid primarily by the municipal corporation having jurisdiction over the street, avenue, highway or road or new portion or additional width of such street, avenue,*

highway or road or, in case of a state or county highway, upon the order of the state commission of highways out of moneys available therefor. Plans and specifications of all changes proposed under sections ninety and ninety-one of this chapter and an estimate of the expense thereof shall be submitted to the public service commission for its approval before the letting of any contract. If such changes are proposed in a highway which is to be constructed or improved as a state or county highway, such plans and specifications shall also be submitted to the state commission of highways for its approval before the letting of any contract. In case the work is done by contract the proposals of contractors shall be submitted to the public service commission, and if the commission shall determine that the bids are excessive it shall have the power to require the submission of new proposals. The commission may employ temporarily such experts and engineers as may be necessary properly to supervise any work that may be undertaken under sections eighty-nine, ninety and ninety-one of this chapter, the expense thereof to be paid by the comptroller upon the requisition and certificate of the commission and included in the cost of the particular change in grade or in the structure above or below grade on account of which it is incurred and finally apportioned in the manner provided in this section.

7. Upon the completion of the work and its approval by the public service commission an accounting shall be had between the railroad corporation and the municipal corporation or the state commission of highways of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation or the state commission of highways has expended more than its proportion of the expense of the change or elimination of any crossing or change in the crossing as herein provided a settlement shall be forthwith made in accordance with the provisions of this section. At any time after the work of elimination of a crossing has been commenced the public service

commission may, upon its own motion or upon the petition of the railroad company or of any municipality interested or of the state commission of highways, make an order for an intermediate settlement and direct payments to be made in connection therewith as in this section provided for a final accounting. All items of expenditure shall be verified under oath, and in case of a dispute between the railroad corporation and the municipal corporation or the state commission of highways as to the amount expended, any judge of the supreme court in the judicial district in which the municipality or the state or county highway is situated may appoint a referee to take testimony as to the amount expended, and the confirmation of the report of the referee shall be final. In the event of the failure or refusal of the railroad corporation to pay its proportion of the expense, the same with interest from the date of such accounting may be levied and assessed upon the railroad corporation and collected in the same manner that taxes and assessments are now collected by the municipal corporation within which the work is done; and in the event of the failure or refusal of the municipal corporation to pay its proportion of the expense an action may be maintained by the railroad corporation for the collection of the same with interest from the date of such accounting, or the railroad corporation may offset such amount with interest against any taxes levied or assessed against it or its property by such municipal corporation.

8. In the event of the appropriation made by the state in any one year being insufficient to pay the state's proportion of the expense of any change that may be ordered the first payment from the appropriation of the succeeding year shall be on account of said change, and no payment shall be made on account of any subsequent change that may be ordered, nor shall any subsequent change be ordered, until the obligation of the state on account of the first named change in grade has been fully discharged, unless the same shall be provided

for by an additional appropriation to be made by the legislature. The state's proportion of the expense of changing any existing grade crossing or the structure of any existing crossing above or below grade shall be paid by the state treasurer on the warrant of the comptroller, to which shall be appended the certificate of the public service commission to the effect that the work has been properly performed and a statement showing the situation of the crossing or structure that has been changed, the total cost and the proportionate expense thereof; and the money shall be paid in whole or in part to the railroad corporation or to the municipal corporation as the public service commission may direct, subject, however, to the rights of the respective parties as they appear from the accounting or intermediate accounting to be had as hereinbefore provided for.

9. No *claim for damages to property* on account of structure under the provisions of this article shall be allowed unless notice of such claim is filed with the public service commission within *six months* after completion of the work necessary for such change or elimination.

[§ 94 thus amended by L. 1915, ch. 240; in effect April 7, 1915.]

§ 95. Proceedings by public service commission for alteration of grade crossings. The public service commission may, in the absence of any application therefor, when in its opinion public safety requires an alteration in an existing grade crossing or a change in any existing structure above or below grade, institute proceedings on its own motion for an alteration in such grade crossing or structure, upon such notice as it shall be deemed reasonable, of not less than ten days however, to the railroad company, the municipal corporation and the person or persons interested, and proceedings shall be conducted as provided in section ninety-one of this chapter. The changes in existing grade crossings or structures authorized or required by the commission in any one year shall be so distributed and

apportioned over and among the railroads and the municipalities of the state as to produce such equality of burden upon them for their proportionate part of the expenses as herein provided for as the nature and circumstances of the cases before it will permit.

[Thus amended by L. 1913, ch. 354; in effect April 24, 1913.]

§ 96. Proceedings to enforce orders of commission. It shall be the duty of the corporation, municipality or person or persons to whom the decisions or orders of the public service commission are directed, as provided in sections eighty-nine, ninety, ninety-one and ninety-five of this chapter, to comply with such decisions and orders, and in case of their failure so to do the commission shall thereupon take proceedings to compel obedience to the decisions and orders of the commission. The supreme court at a special term shall have the power in all cases of such decisions and orders by the public service commission to compel compliance therewith by mandamus, or under the provisions of the public service commissions law, subject to appeal to the appellate division of the supreme court and the court of appeals in the same manner and with like effect as is provided in case of appeals from an order of the supreme court.

§ 97. [Municipal corporation may borrow money.] Whenever in carrying out any of the provisions of sections eighty-nine to ninety-six inclusive of this chapter any municipality shall incur any expense or become liable for the payment of any moneys, it shall be lawful for such municipality temporarily to borrow such money on the notes or certificates of such municipality, and to include the amount of outstanding notes or certificates, or any part thereof, in its next annual tax levy for municipal purposes, or in the discretion of the common council in case of a city, the board of trustees in case of a village, the town board in case of a town, or the board of supervisors in the case of a county, to borrow the same, or any part thereof, on the credit of the municipality, and to issue bonds therefor, which bonds shall be signed by the mayor and clerk in case of a city, the

president and clerk in case of a village, the town board in case of a town and the board of supervisors in the case of a county, and shall be in such form and for such sums and be payable at such times and places with interest not exceeding five per centum per annum, as the common council in case of a city, the board of trustees in case of a village, the town board in case of a town and the board of supervisors in the case of a county, shall direct.

[Thus amended by L. 1914, ch. 498; in effect April 23, 1914.]

§ 98. **Intersections of railroads.** All steam railroads hereafter constructed across the tracks of any other railroad and *any street surface railroad hereafter constructed across a steam railroad shall be above, below, or at grade of such existing railroad as the public service commission shall determine, and such commission shall in such determination fix the proportion of expense of such crossing to be paid by each railroad.*

§ 99. **Application of foregoing sections.** The provisions of sections *eighty-nine to ninety-eight* inclusive of this chapter shall also apply to all steam surface railroads existing on the first day of July, eighteen hundred and ninety-seven, or thereafter, on which, after said date, *electricity or some other agency than steam shall be substituted as a motive power.* None of the provisions of said sections shall apply to crossings in the city of Buffalo under the jurisdiction of the grade crossing commissioners of that city. The terms "municipality" and "municipal corporation" as used in said sections shall include cities, villages, towns and counties.

§ 100. **Temporary leave granted by court to a street surface railroad; bond.** Whenever the railroad or route of any street surface railroad corporation shall intersect and cross, or shall cross the tracks and roadbed of any railroad, operated by locomotive, steam or other power, which are laid in, across or upon the surface of any street, avenue, road or highway in any city, town or village of the state, *having*

less than five hundred thousand inhabitants and such street surface railroad corporation having been unable to agree with the corporation owning the tracks and roadbed so intersected or to be interested and crossed, as to the line or lines, grade or grades, points or manner of such intersection and crossing, or upon the compensation to be made therefor, shall have applied to the court by petition to appoint commissioners to determine the same, the court shall upon application made by such street surface railroad corporation, at, or after, the time of the appointment of such commissioners, or if an answer to the petition of such street surface railroad corporation has been interposed, at any time thereafter, direct that such street surface railroad corporation be permitted to lay its tracks across, and to intersect, upon the surface of the street, avenue, road or highway, the tracks and roadbed of such railroad operated by locomotive steam or other power, provided such street surface railroad corporation shall at the time of obtaining such order, make and file with the clerk of said court, its bond or undertaking in writing, in an amount and with surety or sureties to be approved by the court, conditioned for the full and faithful performance by such street surface railroad corporation of any and all conditions and requirements which may be imposed by said commissioners and be affirmed by the court, in determining the line or lines, grade or grades, points or manner of such intersection and crossing and as to the amount of compensation to be paid therefor, and also conditioned to conform such crossing and intersection made by virtue of such order of the court to the requirements made by said commissioners as affirmed by the court.

§ 101. **Consent of public service commission in certain cases.** No street surface railroad shall be allowed to lay its tracks at grade across the tracks or roadbed of any railroad operated by locomotive steam power at any point where there are three or more tracks of the steam road proposed to be crossed, which tracks have been constructed and in operation at

least two years, unless the written consent of the public service commission be first obtained for such crossing at grade. But this section shall not affect the operation of the preceding section in any suit or proceeding pending on the twenty-ninth day of March, eighteen hundred and ninety-three, nor any renewals of said pending suit or proceeding brought for any cause.

ARTICLE 5.

Street Surface Railroads.

§ 179. *Within what time road to be built. In case any street surface railroad corporation shall not commence the construction of its road, or of any extension or branch thereof, within one year after the consent of the local authorities and property owners or the determination of the appellate division of the supreme court as herein required, shall have been given or renewed, and shall not complete the same within three years after such consents or determination shall have been obtained, its rights, privileges and franchises in respect of such railroad or extension or branch, as the case may be, may be forfeited. If the performance of any act required by this chapter or any prior acts within the times therein prescribed, is hindered, delayed or prevented by legal proceedings in any court, such court may also extend such time for such period as the court shall deem proper or if the performance of any act required by said statutes within the times therein prescribed is hindered, delayed or prevented by works of public improvement, or from any other or different cause, not within the control of the corporation upon which such requirement is imposed, the time for the performance of such act is hereby and shall be deemed to be extended for the period covered by such hindrance, delay or prevention. The time for compliance with any requirement in this or any former act, by a street surface railroad corporation incorporated for the purpose of constructing a street surface railroad and which has prior to March*

twenty-fifth, nineteen hundred and two, obtained or shall prior to June thirtieth, nineteen hundred and three, obtain such consents or determination is hereby extended until June thirtieth, nineteen hundred and four. * * *.

§ 184. Abandonment of part of route.

Any street surface railroad corporation may declare any portion of its route which it may deem no longer necessary for the successful operation of its road and convenience of the public to be relinquished or abandoned. Such declaration of abandonment must be adopted by the board of directors of the corporation under its seal, which shall be submitted to the stockholders thereof at a meeting called and conducted in the same manner as required by law for meetings of stockholders for the approval of leases by railroad corporations for the use of their respective roads. If the stockholders shall, at such meeting, ratify and adopt such declaration of abandonment, the secretary of the company shall so certify under the seal of the corporation, upon such declaration. *Such declaration shall then be submitted to the public service commission for its approval, and if approved by such commission, such approval shall be indorsed thereon or annexed thereto and the declaration so certified and indorsed shall be filed and recorded in the office of the secretary of state, and from the time of such filing, such portion of the route designated in the declaration shall be deemed to be abandoned.*

APPENDIX 4.

THE GREATER NEW YORK CHARTER BEING CHAPTER 378 OF LAWS OF 1897 AS REVISED AND AMENDED BY CHAPTER 466 OF THE LAWS OF 1901.

CHAPTER II.

§18. *The board of aldermen shall consist of members elected one from each of the aldermanic districts here-*

inafter provided for and of the president of the board of aldermen and of the presidents of the several boroughs. The president of the board of aldermen shall be chosen on a general ticket by the qualified voters of the city at the same time and for the same term as herein prescribed for the mayor. He shall be known as the president of the board of aldermen, and shall, except as herein provided, possess all the rights, privileges and powers, and perform the duties which on December thirty-first, eighteen hundred and ninety-seven, were conferred or imposed by law upon the president of the board of aldermen, or the mayor, aldermen and commonalty of the city of New York. The aldermen shall be elected at the general election in the year nineteen hundred and one, and every two years thereafter.

Sec. 39. Every legislative act of the Board of Aldermen shall be by ordinance or resolution.
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CHAPTER III.

Franchises and Grants of Land Under Water.

Title 1. Franchises.

2. Grants of land under water.

TITLE 1.

Franchises.

Sec. 71. Inalienable rights of the city to its properties.

72. Franchises to be granted by board of aldermen or board of estimate and apportionment.

73. Limits and conditions to grants of franchises.

74 Proceedings prior to grant of franchise.

75 Board of aldermen to pass further ordinances.

76 City may dispose of buildings not required for public use.

77. Acts not applicable to grants under this title.

Inalienable Rights of the City to its Properties

§ 71. The rights of the city in and to its water front, ferries, wharf property, land under water, public buildings, wharves, docks, streets, avenues, parks, and all other public places are hereby declared to be inalienable.

Franchises to be Granted by Board of Aldermen or Board of Estimate and Apportionment.

§ 72. Every *grant of or relating to a franchise* of any character to any person or corporation must, unless otherwise provided in this act, be *by ordinance of the board of aldermen or by resolution of the board of estimate and apportionment or a contract executed by or under the authority of the said board of estimate and apportionment*, provided that every such ordinance, resolution or contract shall be subject to the provisions of this act with respect to approval by the mayor. But this section shall not apply to any franchise, right or contract authorized by the board of rapid transit railroad commissioners of The City of New York. (As amended by L. 1905, ch. 629, §10.)

Limitation and Conditions to Grants of Franchises.

§ 73. After the approval of this act no franchise or right to use the streets, avenues, waters, rivers, parkways, or highways of the city shall be granted by any board or officer of The City of New York under the authority of this act to any person or corporation for a longer period than twenty-five years, except as herein provided, but such grant may, at the option of the city,

provide for giving to the grantee the right on a fair revaluation or revaluations to renewals not exceeding in the aggregate twenty-five years. * * * *At the termination of any franchise or right granted by the board of estimate and apportionment all the RIGHTS OR PROPERTY of the grantee in the streets, avenues, waters, rivers, parkways and highways shall cease WITHOUT COMPENSATION. Every such grant of a franchise and every contract made by the city in pursuance thereof MAY PROVIDE that upon the termination of the franchise or right granted by the board of estimate and apportionment the PLANT of the grantee WITH ITS APPURTENANCES, shall thereupon be and become the property of the city WITHOUT FURTHER OR OTHER COMPENSATION TO THE GRANTEE, or such grant and contract may provide that upon such termination and there shall be a fair valuation of the plant which shall be and become the property of the city on the termination of the contract on paying the grantee such valuation. If by virtue of the grant or contract the plant is to become the city's without money payment therefor, the city shall have the option either to take and operate the said property on its own account, or to lease the same for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same as property, excluding any value derived from the franchise; and if the city shall make payment for such plant it shall in that event have the option either to operate the plant and property on its own account or to lease the said plant and property and the rights to the use of streets and public places in connection therewith for limited periods, in the same or similar manner as it leases the ferries and docks. Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract shall also specify the mode of determining the valuation and revaluations therein provided for. (As amended by L. 1905, ch. 629, §11.)*

Proceedings Prior to Grant of Franchise.

§ 74. Before any grant of a franchise or right to use any street, avenue, waterway, parkway, park, bridge, dock, wharf, highway or public ground or water within or belonging to the city shall be made by the board of estimate and apportionment, a public hearing shall be held upon the petition therefor, at which citizens shall be entitled to appear and be heard. No such hearing shall be held, however, until notice thereof, and the petition in full shall have been published at least ten days in the City Record, and at least twice, at the expense of the petitioner, in two daily newspapers published in the city, to be designated by the mayor. The board of estimate and apportionment shall make inquiry as to the money value of the franchise or right proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and shall embody the result of such inquiry in a form of contract, with all the terms and conditions, including the provisions as to rates, fares and charges. *Such proposed contract, together with the form of resolution or resolutions for the granting of the same shall, but not until after the hearing upon the petition, be entered on the minutes of the board of estimate and apportionment, and such board shall, not less than twenty-seven days after such entry and before authorizing such contract or adopting any such resolution, hold a public hearing thereon at which citizens shall be entitled to appear and be heard. No such hearing shall be held until after notice thereof, and the proposed contract and proposed resolution of consent thereto, in full, shall have been published for at least fifteen days, except Sundays and legal holidays, immediately prior thereto in the City of Record, nor until a notice of such hearing, together with the place where copies of the proposed contract and resolution of consent thereto may be obtained by all those interested therein, shall have been published at least twice at the expense of the proposed grantee in the two daily newspapers in which the petition and notice of hearing there-*

of shall have been published. *Every contract or resolution containing or making such grant, shall require the concurrence of members of the board of estimate and apportionment, entitled, as provided by law, to three-fourths of the total number of votes, to which all the members of the said board shall be entitled, and the votes shall be shown by the ayes and noes, as recorded in the minutes of the board. The separate and additional approval of the mayor shall be necessary to the validity of every such contract or resolution.*

This act shall apply to any renewal or extension of the grant or leasing of the property to the same grantee, or to others. Within five days after the final execution of any contract made pursuant to *any such resolution or any such authorization*, a copy of such contract, together with such resolution, duly attested by the secretary of the board of estimate and apportionment, shall be transmitted to each of the following: The comptroller, the corporation counsel, the city clerk and the public service commission for the district having jurisdiction, to be preserved by them in the archives of their departments or offices. All such certified copies shall be deemed to be public records. (As amended by L. 1914, ch. 467, which repeals former §74.)

Acts Not Applicable to Grants Under This Title.

§ 77. Section ninety-three of chapter five hundred and sixty-five of the laws of eighteen hundred and ninety and any acts amendatory thereof or supplemental thereto, shall have no application to grants made under and pursuant to this title.

TITLE 2.

Grants of land under water.

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Repealing Provision.

§ 88. All acts and parts of acts, so far as the same are inconsistent with this chapter are hereby repealed

CHAPTER VI.

Department of Finance

- Title 1. The Comptroller,
2. The Bonds and Obligations of the City,
3. The Chamberlain,
4. The Sinking Funds,
5. Appropriations and the Board of Estimate and Apportionment,
6. Levying Taxes.

TITLE 5.

BOARD OF ESTIMATE AND APPORTIONMENT; HOW CONSTITUTED; DUTIES; THE ANNUAL BUDGET.

§ 226. *The mayor, comptroller, president of the board of aldermen, and the presidents of the boroughs of Manhattan, Brooklyn, The Bronx, Queens and Richmond shall constitute the board of estimate and apportionment. Except as otherwise specifically provided, every act of the board of estimate and apportionment shall be by resolution adopted by a majority of the whole number of votes authorized by this action to be cast by said board. The mayor, comptroller and the president of the board of aldermen shall each be entitled to cast three votes; the presidents of the boroughs of Manhattan and Brooklyn shall each be entitled to cast two votes; and the presidents of the boroughs of The Bronx, Queens and Richmond shall each be entitled to cast one vote. A quorum of said board shall consist of a sufficient number of the members thereof to cast nine votes, of whom at least two of the members hereby authorized to cast three votes each shall be present. No resolution or amendment of any resolution shall be passed at the same meeting at which it is originally presented unless*

twelve votes shall be cast for its adoption. The first meeting of said board in every year shall be called by notice from the mayor, personally served upon the members of said board. Subsequent meetings shall be called as the said board shall direct, and at such meetings the mayor, or in his absence the president of the board of aldermen, shall preside. * * *

(The Greater Charter as amended provides that each of the officials named in sec. 226 *shall be elected* for the term of four years at a general election to be hold for that purpose.)

"BOARD OF ESTIMATE AND APPORTIONMENT; POWERS WITH RESPECT TO CERTAIN SUBJECTS.

§ 242. The board of estimate and apportionment shall have power over the following subjects:

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The board of estimate and apportionment shall have also (3) the *control of all the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and all other public grounds and waters within or belonging to the city; except as in this act otherwise provided. The powers by this act granted to the board of aldermen with respect to the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, docks, waterways, bulkheads, wharves, piers and public grounds and waters which are within or belong to the city shall be subject to such control of the board of estimate and apportionment. If and when the board of estimate and apportionment shall deem it proper in the case of any application or matter affecting any street, avenue, highway, boulevard, concourse, driveway, bridge, tunnel, park, parkway, waterway, dock, wharf, pier or public ground or water within or belonging to the city, whether the board of aldermen or any other department or officer shall have acted or omitted to act, the board of estimate and apportionment*

may itself originally act or may, by amendment, revision or repeal of any resolution, ordinance, grant or other action adopted or had by the board of aldermen or any other department or officer, exercise its said power of control; and if and when the board of estimate and apportionment shall so act or exercise such control, such action or control shall be fully and finally operative notwithstanding any resolution, ordinance, grant or other action adopted or had by the board of aldermen or any other department or officer of the city or any omission to act on the part of the board of aldermen or other department or officer. The board of estimate and apportionment shall hereafter, except in the cases where franchises, rights or contracts shall be granted or authorized pursuant to the rapid transit act, chapter four of the laws of eighteen hundred and ninety-one, and the amendments thereof, have the **exclusive** power in behalf of the city to grant to persons or corporations franchises or rights or make contracts providing for or involving the occupation or use of any of the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers or public grounds or waters within or belonging to the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, provided, however, that no such exercise or power by the board of estimate and apportionment shall be operative until the same shall be in writing approved by the mayor separately from and after the action of the board of estimate and apportionment; and provided, further, that this section shall not prevent the exercise by the board of aldermen of the powers expressly granted it by sections forty-nine, fifty, fifty-one and fifty-two of this act; but such exercise or powers by the board of aldermen shall in every case be subject to the control by this act granted to the board of estimate and apportionment over all the streets, avenues, highways, boulevards, con-

*courses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and all public grounds and waters which are within or belong to the city. * * ** (As amended by Laws of 1905 ch. 629 sec. 14).

"CHAPTER X.

Contracts and Local Improvements.

- Title 1. General Provisions relating to Contracts.
 2. Local Boards.
 3. Local Improvements.
 4. Maps and Plans."

"TITLE 4.

The Map or Plan of the City of New York, Establishing of Grades, Changes Therein, Map of Sewer System, and Sewer Districts.

"§ 439. It shall be the duty of the president of each borough comprised within the city of New York, as constituted by this act, subject to the limitations hereinafter provided, to prepare a map of that part of the territory embraced within the borough of which he is president, *of which a map or plan has not heretofore been finally established and adopted*, as set forth in section four hundred and thirty-eight of this act, locating and laying out all parks, playgrounds, *streets*, bridges, tunnels and approaches to bridges and tunnels, and indicating the width and grades of all such streets so located and laid out." * * * "Whenever and as often as the president of any borough shall have completed the map of a part of the territory aforesaid, he shall report the same together with the surveys, maps and profiles, showing the parks, playgrounds, streets, bridges, tunnels,

and approaches to bridges and tunnels located and laid out by him, and the grades thereof, to the board of estimate and apportionment for its concurrence and approval, subject, nevertheless, to such corrections or modifications as in the judgment of the majority of said board may be advisable; *and the board thereafter shall cause such map or plan, and such profiles, as finally adopted by it, to be certified by the secretary of said board, and filed as follows:* One copy thereof in the office in which conveyances of real estate are required to be recorded in the county in which the territory shown upon such map is located; *one copy thereof in the office of the corporation counsel; and one copy thereof in the office of the president of the borough, who shall have prepared such map. Such map and profiles, when so adopted and filed, shall become a part of the map or plan of the City of New York, and shall be deemed to be final and conclusive with respect to the location, width and grades of the streets shown thereon, and the same shall not be subject to any further change or modification except as provided in section four hundred and forty-two of this act; provided, however, that local boards at a joint meeting of all the boards comprised within the borough for which said map was adopted, within three months after the opening of a street, shall have the power to alter the grade of such street, and to alter the grades of intersecting streets, so far as it may be necessary to conform the same to new grades of the street opened.* Nothing herein contained shall affect or limit the powers vested in the commissioner of docks and the commissioners of the sinking fund by chapter sixteen of this act. (As amended by L. 1917, ch. 632.)”

“Grades Established by User.

“§ 441. *Whenever any street in The City of New York shall have been used as such for upwards of twenty years without having the grade thereof established by*

law, the level or surface of such street as so used shall be deemed to be and to have been the grade thereof."

"Authority of Board of Estimate to Change Map or Plan of City or to Change Grades.

§ 442. The board of estimate and apportionment is authorized and empowered, *whenever and as often as it may deem it for the public interest so to do, to change the map or plan of the City of New York, so as to lay out new streets, parks, playgrounds, bridges, tunnels and approaches to bridges and tunnels and parks and playgrounds, and to widen, straighten, extend, alter and close existing streets, and courtyards abutting streets, and to change the grade of existing streets shown upon such map or plan.* * * * Notice of any proposed action of the board with reference to any such change in the map or plan of the city shall be published for ten days, in the City Record [and the corporation newspapers], in which notice a date shall be fixed for a public hearing at which all persons interested in such change shall be heard, such date to be not less than ten days after the first publication of such notice. After the due publication of such notice, and after hearing protests and objections, if any there be, against the proposed change, if the said board shall favor such change, notwithstanding such protests and objections, and the same receives the approval of the mayor such change in the map or plan of the city of New York, or in the grade of any street or streets shown thereon or the bulkhead and pierhead lines so established, shall be deemed to have been made. Nothing herein contained shall affect or limit the powers vested in the commissioner of docks and the commissioners of the sinking fund by chapter sixteen of this act. (As amended by L. 1917, ch. 632.)"

CHAPTER XVII.

Taxes and Assessments.

- Title 1. Department of taxes and assessments; powers and duties.
2. Assessments for local improvements other than those confirmed by a court of record.
 3. Vacating and modifying assessments for local improvements other than those confirmed by a court of record.
 4. Opening streets and parks.
 5. Sales of lands for taxes, assessments and water rates.

TITLE 1.

**Department of Taxes and Assessments;
Powers and Duties.**

. . .

TITLE 2.

**Assessments For Local Improvements
Other Than Those Confirmed by
a Court of Record.**

Assessment; tem, how construed.

§942. . . .

Mayor to appoint a board of assessors; salary subordinates.

§943. . . .

The board of revision of assessments.

§944. . . .

Powers of the two boards.

§945. . . .

Certificates on which assessments are made.

§946. . . .

Assessments not to exceed one-half the valuation.

§947. . . .

Paving and repaving of streets; character of materials and method of payment therefor.

§948. . . .

How property shall be described by the assessors.

§949. * * *

Local assessments for costs of exterminating mosquitoes in certain boroughs.

§949a. * * *

Notice of completion of assessments to be given.

§950. * * *

**"AWARD OF DAMAGES FOR CHANGES OF GRADE; LIABILITY
IN SUCH CASES.**

§ 951. All cases where a change of grade of any street or avenue has been made prior to the taking effect of this act shall, as to the liability to make compensation for damages caused by such change of grade, be governed by the laws in force at the time such change of grade was completed and accepted by the city authorities. After the taking effect of this act an abutting owner who has built upon or otherwise improved his property in conformity with the grade established by lawful authority, and such grade is changed after such buildings or improvements have been erected, and the lessee thereof, shall be entitled to damages for such change of grade. An owner who has built upon or otherwise improved his property prior to the original establishment of a grade by lawful authority and the lessee thereof, shall be entitled to damages caused by the grading of the street in accordance with such established grade. The word lessee as used in this section shall include only such parties or persons whose lease covers the entire real property and the term of which does not expire in less than ten years from the date of the completion and acceptance of the grading by the city authorities and who are obligated under their lease to make repairs and alterations made necessary by the grading. Except as herein provided, there shall be no liability for originally establishing a grade or for changing an established grade. Damages to such buildings and improvements shall be ascertained and assessed by the board of assessors in the manner herein-

after provided. All laws inconsistent herewith are hereby repealed. Whenever any street shall have been graded to a grade which, in the opinion of the board of estimate and apportionment, has been occasioned by an improvement other than the normal and usual street improvement the board of estimate and apportionment may, in its discretion, within sixty days after the grading shall have been completed and accepted by the city authorities in charge of the work, make a certificate that, in its opinion, the street in question has been graded to a special grade. Such certificate shall be transmitted to the board of assessors, together with a plan and profile of the portion of the street affected by such special grade; upon such plan and profile there shall be shown the level which, in the opinion of the board of estimate and apportionment, constitutes a normal grade for the street, and the special grade to which the street has been graded. Upon the receipt by the board of assessors of the certificate of the board of estimate and apportionment, together with the accompanying plan and profile, the board of assessors shall be authorized and empowered to determine the damage which each owner or lessee of the unimproved lands fronting on that portion of the street affected by such special grade has sustained by reason of the grading of the street to such special grade, that is to say the damage sustained by reason of the departure of the grade of the street from the normal grade as shown on such plan and profile. When any street shall have been regulated and graded, it shall be the duty of the board of assessors, after the certificate of the completion and acceptance by the city authorities in charge of the work of such grading shall have been received by it, to cause to be published in the "City Record" and the corporation newspapers, twice a week for four successive weeks, a notice to all persons claiming to have been injured by the physical grading of such street to present their claims, in writing, to the board of assessors. Said notice shall specify a place where and a time when the said board will receive evidence and testimony of the

nature and extent of such injury. The board of assessors shall have all the powers conferred upon the commissioners of estimate and assessment by section one thousand and eight of this act, and all the provisions of said section shall apply to the proceedings before the board of assessors. After hearing and considering the said testimony and evidence, and after viewing and inspecting the property claimed to have been injured, the board of assessors shall make such awards for such loss and damage, if any, as it may deem proper. No award shall be made, in any case arising after the taking effect of this act, unless a claim in writing therefor shall have been filed with the board of assessors within ninety days after the grading shall have been completed and accepted by the city authorities in charge of the work. In cases in which the grading of the street has been completed at the time this act takes effect, no award shall be made unless a claim in writing therefor shall have been filed with the board of assessors prior to July first, nineteen hundred and sixteen. The board of assessors shall compute interest upon awards made by it, at the rate of six per centum per annum, from the time of the completion and acceptance of the grading of the street to the date set in the published notice for the hearing upon objections to the assessment. The board of assessors shall also determine the reasonable expense incident to the making of awards for damages which have been incurred by it or by the corporation counsel of the city of New York upon the hearings before said board. The amount of the said awards, the interest upon the same as computed by the board of assessors, and the reasonable expenses of making the awards as determined by the board of assessors shall be included in an assessment to be levied upon the property deemed by the board of assessors to have been benefited by the grading of the street in question, or by the improvement of which said grading forms a part. Any person to whom an award has been made or who has an interest in such award or the city of New York may appeal from the determination of the board of as-

sessors to the board of revision of assessments. Upon such appeal, the board of revision of assessments may confirm, reverse, or modify the determination of the board of assessors, and may either send the matter back to the board of assessors for further consideration, or may itself make a new determination of the matter in controversy. The determination of the board of revision of assessments shall be final and conclusive upon all parties and persons interested in all awards made by the board of assessors. (*As amended by L. 1916, ch. 156, §4.*)”

Foregoing section; how construed.

§952. . . .

Awards; when to be paid; action for default.

§953. . . .

Assessments for deepening water in docks, etc.

§954. . . .

Assessments for grading streets and other property with material excavated in making other public improvements.

§955. . . .

TITLE 4.

Article I.

Opening of streets and parks, and the acquisition of title in fee, or to an easement in real property for streets, parks and other public purposes in the City of New York.

THE CITY MAY ACQUIRE REAL PROPERTY FOR STREETS, PARKS, ETC.

“§ 970. The city of New York may *acquire title either in fee or to an easement*, as may be determined by the board of estimate and apportionment, for the use of the public, to all or any of the real property required for streets and courtyards abutting streets, and for

parks, parkways, playgrounds, approaches to bridges and tunnels and sights or land above or under water for bridges and tunnels, and sights or lands above or under water, for all improvements of the navigation of waters within or separating portions of the City of New York, or for the improvement of the water fronts of the City of New York, or park or parks thereof, *heretofor duly laid out upon the map or plan of the city of New York, of the City of Brooklyn, or Long Island City, or of any of the territory consolidated with the corporation heretofore known as the Mayor, aldermen and commonalty of the City of New York, or hereafter duly laid out upon the map or plan of the City of New York, as herein constituted, and cause the same to be opened, or acquire title as above stated to such interests in real property as will promote public utility, comfort, health, enjoyment, or adornment, the acquisition of which is not elsewhere provided for. The board of estimate and apportionment may specify what use is required of the real property which it may determine shall be acquired for public use, and the extent of such use, and may direct the same to be acquired whenever and as often as it shall deem it for the public interests so to do. The real property required for such purposes may be taken therefor, and compensation and recompense shall be made to the owners thereof. The real property benefited by the improvement may be assessed for the benefit and advantage derived therefrom. * * **

VESTING OF TITLE IN THE CITY TO REAL PROPERTY TAKEN
FOR STREETS OR PARKS OR OTHER PURPOSES.

“§ 976. *Should the board of estimate and apportionment at any time deem it for the public interest that the title to the real property required for any improvement, authorized herein, should be acquired by the city of New York at a fixed or specified time, the said Board of Estimate and Apportionment may direct, by a three-fourths vote, that upon the date of the entry of the order granting the application to condemn or upon the date of the filing of the oaths of the commissioners of*

estimate, as the case may be, as provided for in this title, or upon a specified date after either, the title to any piece or parcel of real property lying within the lines of any improvement herein authorized, shall be vested in the city of New York. Upon the date of the entry of the order granting the application to condemn, or upon the date of the filing of such oaths, as the case may be, or upon such subsequent date as may be specified by said board, the City of New York shall become and be seized in fee of, or of the easement, in, over, upon, or under, the said real property described in the said resolution, as the board of estimate and apportionment may determine, the same to be held, appropriated, converted and used to and for such purposes accordingly. In such cases interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the City of New York, as aforesaid, from said date to the date of the final decree of the court or to the date of the report of the Commissioners of estimate, as the case may be, shall be awarded by the court or by the Commissioners as the case may be, as part of the compensation to which such owners are entitled. In all other cases, title as aforesaid shall vest in the city of New York upon the filing of the final decree of the court or upon the entry of the order confirming the report of the commissioners of estimate, as the case may be, and the reversal on appeal of the final decree of the court or of the order of confirmation, as the case may be, shall not divest the city of title to the real property affected by the appeal. Upon the vesting of title the city of New York; or any person or persons acting under its authority, may immediately, or any time thereafter, take possession of the real property so vested in the city, or any part or parts thereof, without any suit or proceeding at law for that purpose. The title acquired by the city of New York to real property required for a street shall be in trust; that the same be appropriated and kept open for, or as a part of a public street, forever, in like

manner as the other streets in the city are and of right ought to be. The board of estimate and apportionment may at the time of the adoption of the resolution instituting the proceeding in which lands are to be acquired for court-yard purposes, determine whether the fee or an easement shall be acquired in lands required for court-yards, and it may prescribe such conditions and limitations on the title so to be acquired and as to the temporary or permanent use of the land so to be acquired as it may deem proper, and the title which the city shall acquire to the lands required for court-yard purposes shall be such as the board of estimate and apportionment shall determine, and such title shall be held by the City subject to such limitations and conditions as to title thereto or as to the use thereof as the board of estimate and apportionment shall prescribe. If not inconsistent with such limitations and conditions as to title or as to use, land acquired for court-yard purposes may be devoted to general street uses whenever the board of estimate and apportionment shall determine that public interest requires such use. If any individual or corporation before the entry of the order granting the application to condemn or before the appointment of the commissioners of estimate, as the case may be, *has acquired by private grant, prescription or otherwise, any easement for the purpose of laying or maintaining in the real property* to be acquired for street purposes as herein provided, underground pipes or conduits for the distribution of water, gas, steam or electricity, or for pneumatic service, such easement shall not be extinguished, but the title to the real property so to be acquired for the purposes herein provided for shall be taken subject to such easements; provided however that nothing herein contained shall be so construed as to limit the power of the city of New York to acquire by purchase, or by condemnation proceedings the entire plant or service of such individual or corporation, or to acquire such easements in such streets in any other appropriate proceedings. The title in fee acquired by the

City of New York to real property required for all purposes provided for in this title, *except street and courtyard purposes*, shall be a fee simple absolute. (Added by L. 1915, ch. 606, as amended by L. 1917, ch. 631.)”

MAPS

TOO

LARGE

FOR

FILMING